

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,171

DOLPHIN G. THOMPSON,

Appellant,

v.

THE EVENING STAR NEWSPAPER COMPANY,

Appellee.

Appeal From the United States District Court
For the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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QUESTIONS PRESENTED

I.

DID THE TRIAL COURT ERR IN ITS ENTRY OF JUDGMENT FOR THE APPELLEE?

- (a) Summary Judgment does not lie where material issues of fact, malice and motives are alleged.
- (b) Defamation of appellant's character as alleged is not damnum absque injuria, but is a question of fact for trial determination.

II.

DID THE JUDGMENT OF THE COURT BELOW VIOLATE THE RECENT DECISIONS OF THE SUPREME COURT AND THE UNITED STATES COURTS OF APPEALS?

- (a) U.S. Supreme Court Decisions --
- (b) U.S. Courts of Appeals Decisions --

III.

DOES THE RECORD CONSIDERED AS A WHOLE DISCLOSE GENUINE FACTUAL ISSUES FOR TRIAL DETERMINATION?

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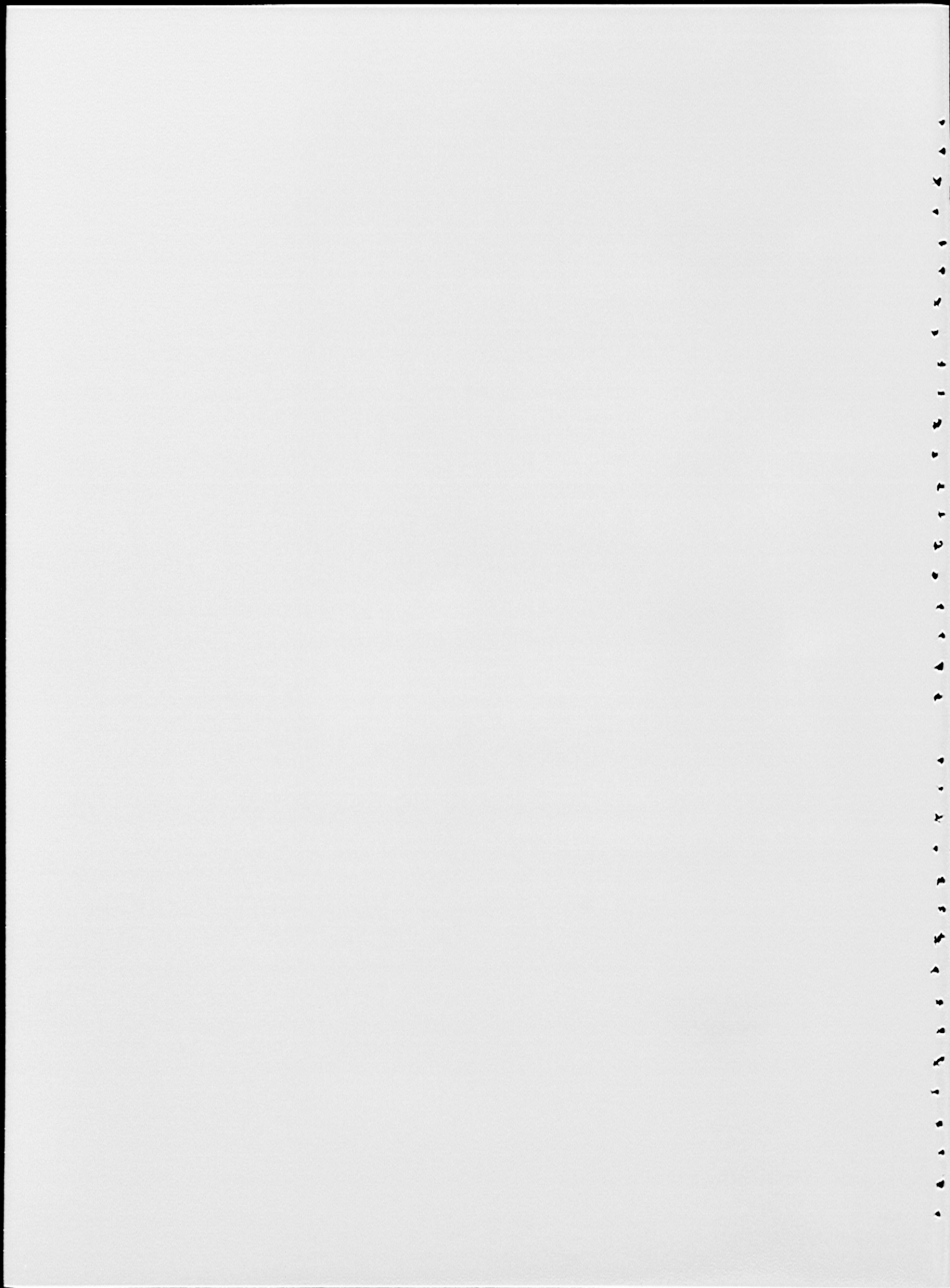
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v.

THE EVENING STAR NEWSPAPER COMPANY,

Appellee.

Appeal From the United States District Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from an order of the United States District Court for the District of Columbia granting appellee's motion for summary judgment, entered May 23, 1967. Notice of Appeal was seasonably filed, on June 19, 1967.

Jurisdiction for this appeal is to be found in the provisions of 28 U.S.C., section 1291.

The time for filing appellant's brief on appeal in this court was extended by order of court, entered on September 7, 1967, to and including September 28, 1967.

STATEMENT OF THE CASE

The appellant filed his action in the court below for libel, seeking compensatory and punitive damages against the appellee.

The amended complaint avers that the appellant was a professional businessman engaged in the public relations business in the District of Columbia. That the appellee published in its newspapers, the Evening Star and the Sunday Star, on May 3, May 6 and May 24, 1964, libelous and defamatory statements of and concerning the appellant.

The amended complaint further averred that these statements were false and untrue, and that the appellee knew that the said publications were false and untrue and that the said statements were maliciously made in order to injure the appellant.

The publication dated May 3, 1964, was captioned "The War of the D. C. Democrats," and it characterized the appellant as a "racist," who had once been "chief local spokesman for Malcolm X and his Black Muslim Mosque."

The article, published on May 6, 1964 entitled "Old Guard Victory," charged the appellant's "blatantly racist appeal" as responsible for the defeat of the Dedmon Slate.

On May 24, 1964, the appellee published portions of a letter to the "Editor" written by the appellant, and in a note to said letter, the appellee's "Editor's Note," repeated its charge of "blatantly racist appeal" by the appellant, as the cause of the rejection of the "Dedmon Slate."

The appellant, a public relations man in the District of Columbia, was one of the founders and leaders of a slate of candidates for the offices of delegates and alternate delegates to the Democratic National

Convention, and membership on the District of Columbia Democratic Central Committee. The slate organized and sponsored by the appellant was known as the Dedmon-McGerr Slate, which was one of three slates of candidates entered in the Democratic primary election.

With the foregoing background at stake, the appellee seized upon the occasion to seek reprisal against the appellant for the part he played in a crusade urging the Evening Star Newspaper, in 1961, to discontinue its discriminatory policy of non-employment of qualified persons of color and to inaugurate an employment policy free of racial barriers. (See appellant's affidavit, App. p. 29.)

This reprisal is evidenced by the allegations of the amended complaint which charged that: "the defendant, the Evening Star, did on May 3, May 6, and May 24, 1964, libel and defame the plaintiff herein, in that the defendant, recklessly contriving and intending to injure the plaintiff and destroy his reputation as an effective public relations counselor, and to expose him to public hatred, contempt, ridicule and disgrace, did maliciously, wickedly and wilfully, through its newspaper print, publish, sell, circulate and distribute certain statements which did defame this plaintiff's name, good reputation and character." (See Appendix, the amended complaint, App. p. 3.)

The other allegations of the amended complaint carefully characterize the appellee with publications wilfully and maliciously aligning the appellant with the "Malcolm X" movement and other racism.

The answer of the appellee filed to the amended complaint admits the publications of May 3, May 6 and May 24, 1964. The appellee pleaded as affirmative defenses the following: (1) qualified privilege, (2) fair comment on a matter of public interest, (3) first and fifth amendments, (4) truth, and (5) that appellant was without standing to complain of the publication of May 6, 1964. That thereafter, on January 24, 1967, a pre-trial order was entered by the pre-trial examiner and the issues were narrowed for trial determination. (App. p. 14)

On February 21, 1967, the appellant, in accordance with the pre-trial examiner's order, filed his list of witnesses and itemization of damages, *supra* p. 17. All of which was preparatory to trial.

That on March 16, 1967, the appellee filed its motion for summary judgment, seeking a dismissal of the amended complaint. The trial court, after a hearing on the said motion, entered its order May 23, 1967, granting the appellee's motion for summary judgment. The basis of the court's ruling was the absence of a genuine issue of fact, and that the appellee was entitled to judgment as a matter of law. That therefore on June 6, 1967, appellant filed in the court below, his motion to alter or amend the said judgment entered on May 23, 1967. This motion was supported by an attached affidavit of the appellant in which he pinpointed two letters written him by the editor of appellee's newspaper, dated January 18, 1961, and January 31, 1961, showing actual malice (*supra*, pp. 19-20).

Appellant sought through the said motion to have the trial court reconsider and re-evaluate the legal position taken in its judgment entered on May 23, 1967, because of the existence of evidentiary facts to show actual malice on the part of appellee, and to have the court make a re-appraisal of the New York Times case, as expressed by the U. S. Supreme Court in a later holding in the case of *Time, Inc. v. Hill*, 385 U.S. 374. The appellant also sought to have the court consider the recent significant ruling by the U. S. Court of Appeals, 2nd Circuit, who, on January 12, 1967, affirmed the decision of the U. S. District Court for the Southern District of New York in *Barry M. Goldwater v. Ralph Ginzburg, Warren Boroson and Fact Magazine, Inc.*, No. 65 Civ. 2676. Judge Inzer B. Wyatt's written opinion, December 27, 1966, held, "The issue of actual malice on the part of the defendants seems peculiarly inappropriate for disposition by summary judgment because it concerns 'motive,' 'intent,' and subjective feelings and reactions." *Empire Electronics Co. v. United States*, 311 F.2d 175, 180 (2d Cir. 1962); see also 6 *Moore's Federal Practice* (2d ed.) 2581. The U.S. Supreme Court has cautioned against summary judgment "where motive

and intent play leading roles," *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464, 473 (1962).

The trial court denied the motion to alter or amend on June 19, 1967. Appellant was 4 days late in filing, in the court below, his said motion to alter or amend judgment. This untimeliness was due to the dereliction of his then attorney of record. The said motion was prepared and in the possession of his attorney well within the 10 day period provided in Rule 59 (e) of the Federal Rules of Civil Procedure, and appellant was given definite assurance that said motion would be seasonably filed. However, when appellant became aware that said motion had not been filed, appellant proceeded immediately, and filed said motion "pro se," on June 6, 1967. Because of the untimeliness of said motion, appellee sought and obtained from the trial court an order entered on June 30, 1967, stating that the said motion to alter or amend judgment was denied (1) because it was without merit, and (2) because the court was without jurisdiction.

This appeal, therefore, is taken from the judgment entered on the 23rd day of May, 1967, in the court below, and the said appeal is prosecuted to relieve from the errors embodied in said judgment.

SUMMARY OF ARGUMENT

I

Summary judgment should be entered only when the pleadings, depositions, affidavits and admissions filed in the case show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. This rule authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is. But where genuine issues remain for trial determination, the purpose of the rule is not to cut litigants off from their right of trial by jury or trial by the Court, if they have issues to try. The U. S. Supreme Court continuously holds that summary procedure should be sparingly used and "where

motive and intent play leading roles, the proof is largely in the hand of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavits is no substitute for trial by jury which so long has been the hallmark of even hand justice."

II

The decisions of the Supreme Court together with this and other Federal Appellate Courts have proclaimed the issue of "actual malice," in defamation suits, as a factual issue for trial determination.

The judgment of the court, denying the appellant a trial on the merits of the issue of actual malice, is in defiance of the said decisions of the U. S. Supreme Court, together with the decisions of this and other Federal Appellate Courts.

It may be pointed out that, with the exception of the case of *Keogh v. Pearson*, substantially all of the remaining cases recently decided by the U. S. Supreme Court and other Federal Appellate Courts were first tried on the merits.

III

The record on file in this court in the case at bar demonstrates beyond question that the appellant is entitled to a trial on the merits, and summary judgment was improvidently granted in favor of the appellee.

The trial court did not preface its judgment with a memorandum opinion, but it is obvious from an analysis of the applicable cases that the said trial court failed to recognize and apply the law, as enunciated by the Federal Appellate Courts and the U. S. Supreme Court.

This misapplication of the applicable law entitles the appellant to a reversal of the judgment and a trial on the merits.

ARGUMENT

I. SUMMARY JUDGMENT DOES NOT LIE WHERE MATERIAL ISSUES OF FACT, MALICE AND MOTIVE ARE ALLEGED

The U. S. Supreme Court and this Court have continuously held that where genuine factual issues remain for trial determination summary judgment will not lie. *United States v. Diebold, Inc.*, 369 U.S. 654, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, *Underwater Storage, Inc. v. United States Rubber Co.*, ___ U.S. App. D.C. ___, 371 F.2d 950, and *Evers v. Buxbaum*, 102 U.S. App. D.C. 334, 253 F.2d 356.

(a) What Is A "Fact" Which May Be Disputed?

The disputed fact must be an evidentiary fact. Usually there will be no trouble in determining whether a dispute as to a material fact exists. There are circumstances where there is no dispute as to the evidentiary facts, but there is a dispute as to the inferences of fact to be drawn from them.

Another question which continually arises is whether, when the movant supports his motion by affidavits and/or depositions, the credibility of the deponents is dispositive of the factual issues entitling the movant to summary judgment. This court has held in *Farrell v. D.C. A.A. Union*, 80 U.S. App. D.C. 396, 153 F.2d 647, that an affidavit in support of such motions, "cannot be treated, for purposes of the motion, as proof contradictory to well pleaded facts in the complaint. There is a great difference between discovering whether there be an issue of fact and deciding such issue. The affidavit can be used for the former purpose but not for the latter."

The difficulty may arise when the opposing party does not indicate any basis for impeachment, and stems from the case of *Arnstein v. Porter*, 2d Cir., 154 F.2d 464, where Judge Frank made clear his antipathy to the summary judgment procedure, casting grave doubt on the usefulness of the procedure with strong language. In the foregoing

case the issue on which the decision turned was whether there was sufficient evidentiary facts of copying by the defendant to prevent summary judgment in his favor. Plaintiff had sought to prove copying by proving similarity in the compositions and access to plaintiff's songs by the defendant. Plaintiff's deposition had been taken, and in this, he sought to prove access by statements to the effect that defendant's stooges had watched him, followed him, lived in his apartment, that his rooms had been ransacked, that many of his works had been publicly exhibited. The defendant in his deposition denied access and copying. The trial court held that the plaintiff's story was too fantastic to be believed and granted a summary judgment for defendant. Judge Frank, in his opinion, stated that:

"... if, after hearing both parties testify, the jury disbelieves defendant's denials, it can, from such facts, reasonably infer access. It follows that, as credibility is unavoidably involved, a genuine issue of material fact presents itself. With credibility a vital factor, plaintiff is entitled to a trial where the jury can observe the witnesses while testifying. Plaintiff must not be deprived of the invaluable privilege of cross-examining the defendant—the 'crucial test of credibility'—in the presence of the jury. Plaintiff, or a lawyer on his behalf, on such examination may elicit damaging admissions from defendant, more important plaintiff may persuade the jury, observing defendant's manner when testifying, that defendant is unworthy of belief."

In evaluating the effect of affidavits in support of a motion for summary judgment, the Second Circuit stated in the case of *Colby v. Klune, et al.*, 2d Cir., 178 F.2d 872, 873, that:

"For the affidavits do not supply all the needed proof. The statements in defendants' affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and absent an unequivocal waiver of a trial on oral testimony—credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important elements of witness' demeanor."

The U. S. Supreme Court has also touched on the question of credibility in connection with summary judgment in *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620.

In a suit to recover an oil and gas lease, on the basis that there was in the case an issue as to the fact of the market price or value of plaintiff's gas at the time of delivery, the defendant supported its motion for summary judgment with affidavits consisting of opinion as to this value, but the Supreme Court considered such opinion evidence inherently weak, and insufficient to entitle the defendant to a judgment as a matter of law. In fact, in the foregoing case, the defendant undertook to establish the absence of a triable issue by the affidavits of eight persons. In rejecting the probative effect of such affidavits to circumvent a trial of the issues involved, the Supreme Court observed at page 628 of its opinion, that:

"* * * the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact."

In the case at bar the pleadings, pretrial statement and the appellant's affidavit clearly show genuine factual issues for trial determination. This court has reaffirmed the above holdings in its recent decision in the case of *Washington Post Company v. Keogh*, ___ U.S. App. D.C. ___, 365 F.2d 965 (1966).

(b) Defamation of Appellant's Character As Alleged Is Not Damnum Absque Injuria But Is A Question of Fact for Trial Determination.

The distinction between oral and recorded defamation is an old one, dating back to the time when the law courts succeeded to the jurisdiction of the ecclesiastical Courts. *King v. Lake*, 145 Eng. Rep. 552 (1680); *Delibellis Famosis*, 5 Coke, Rep. 125a; *Thorley v. Lord Kerry*, 4 Taunt (Eng.) 355 (1812). Unlike oral defamation, in which the Courts have uniformly drawn a definite line between words slanderous per se and

those deemed actionable only upon allegation and proof of some special detriment, no such criterion was adopted in the case of written, printed or otherwise recorded defamatory utterances.

The U. S. Supreme Court, in the classic case of *White v. Nichols*, 44 U. S. 266, after suggesting the reasons for the more severe incidents which the law has come to attach to libel as contrasted with slander, proceeds to define prima facie libel as:

"Every publication, either by writing, printing or pictures, which charges upon, or imputes to, any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous."

An attempt to inject the concept of "libelous per se" into the law of defamation was summarily thwarted by the Supreme Court, per Holmes, J., in the following language in *Peck v. Tribune Co.*, 214 U.S. 185:

"The question, then, is whether the publication was a libel. It was held by the Circuit Court of Appeals not to be, or at most to entitle the plaintiff only to nominal damages, no special damages being allowed. It was pointed out that there was no general census of opinion that to drink whiskey is wrong or that to be a nurse is discreditable. * * * But it appears to us that such inquiries are beside the point. It may be that the action for libel is of little use, but while it is maintained it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of majority vote."

The articles published by appellee are in their total effect clearly defamatory of the appellant. All of the articles published by appellee of and concerning appellant appeared as a series in appellee's newspaper, prior to and after the May 5 primary election of 1964, and in connection with said election. Hence, they must be read as a whole in the unitary sequence, and in the sense in which the ordinary reader would understand them. *Washington Post Co. v. Chaloner*, 250 U.S. 290, *Lane v. Washington Daily News*, 66 App. D.C. 245, 85 F.2d 882, *Myerson v. Hurlbut, etc.*, 68 App. D.C. 360, 98 F.2d 232.

In the light of appellant's further arguments appearing in II and III hereinafter, appellant will not pursue this line of inquiry further in the present argument. Suffice it to say that the hereinabove quoted decisions show that appellee's newspaper articles were defamatory of appellant's reputation, because, to quote from Restatement of the Law, Torts, section 559: "It tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from association or dealing with him."

This for centuries has been an ingredient of the Roman Law, as that system occupied a foremost place in universities of the continent of Europe. The character and reputation, as suffered by the appellant at the hand of the appellee, has found condemnation in the civil law and the common law as they are studied side by side in the English universities. Indeed, the science of comparative jurisprudence has protected against malicious and wilful defamation, throughout the legal institutions of all mankind and of all ages. (The Legal Systems of the World, Edgar Bodenheimer (1954), and 29 Harv. L. Rev. 640, and 3 Col. Law Rev. 546.)

II. DID THE JUDGMENT OF THE COURT BELOW VIOLATE THE RECENT DECISIONS OF THE U.S. SUPREME COURT AND THE UNITED STATES COURTS OF APPEALS?

(a) Decisions of the U. S. Supreme Court

It is implicit in the judgment of the court below entered on May 23, 1967, that the issue of actual malice or reckless disregard of falsity is an issue of law and not one of fact.

The appellee cites, in support of its motion for summary judgment, the cases of *New York Times Co. v. Sullivan* and *The Washington Post Co. v. Keogh*. These cases are inapposite to support either appellee's position or the said judgment entered below.

The U. S. Supreme Court has fully discussed and decided the questions of malice, actual malice and reckless disregard as to falsity, in the following cases:

New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, *Garrison v. Louisiana*, 379 U.S. 64, *Rosenblatt v. Baer*, 383 U.S. 374, *Time, Inc. v. Hill*, 385 U.S. 374, and *Curtis Publishing Co. v. Butts*, 388 U.S. 130.

In *New York Times Co. v. Sullivan*, *supra*, the U. S. Supreme Court held that "The Constitutional guarantees (of freedom of speech and press) require * * * a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The trial court jury had awarded L. B. Sullivan, Commissioner of Public Affairs, Montgomery, Alabama, a judgment in the sum of \$500,000.00. In reversing the judgment for the reasons stated above, the U. S. Supreme Court was required for the first time to determine the extent to which the constitutional protections for speech and press limit a state's power to award damages in libel action brought by a public official against critics of his official conduct. The trial judge had instructed the jury that the published statements were "libelous per se," that legal injury was implied without proof of actual damages.

Therefore, the nexus of the *New York Times* case is that "public officials" must prove by a fair preponderance of the evidence that the "published statements" were motivated by "actual malice."

In the case at bar, even if it be conceded *arguendo* that appellant was a public official, yet, he was precluded from, and denied the right of trial, to determine the issue of "actual malice." Thus, the conclusion to be drawn from the *New York Times* case impels a trial determination of the issue of "actual malice," quite to the contrary of the position taken by the appellee, and the holding of the trial court.

Moreover, the issue of appellant's status, whether he was a "public official" or "public figure" or neither of the two is a major question of fact for trial determination.

In *Garrison v. Louisiana, supra*, the Supreme Court, in reversing Garrison's criminal conviction for libel, re-affirmed its ruling in the *New York Times* case and also limited the state's power to impose criminal sanction for criticism of official conduct of public officials.

In the case of *Rosenblatt v. Baer, supra*, the U. S. Supreme Court, in reversing and remanding the judgment of the New Hampshire Courts, in which the plaintiff was awarded a jury recovery, stated that:

"His (plaintiff's) theory was that his role in the management of the area was so prominent and important that the public regarded him as the man responsible for its operations, chargeable with its failures and to be credited with its successes. Thus to prove the article referred to him, he showed the importance of his role; the same showing, at least, raises a substantial argument that he was a 'public official.' The record here, however, leaves open the possibility that respondent could have adduced proofs to bring his claim outside the (*New York Times*) Rule. Moreover, even if the claim falls within (*New York Times*) the record suggests respondent may be able to present a jury question of malice as there defined. Because the trial here was had before the (*New York Times*), we have concluded that we should not foreclose him from attempting re-trial of his action."

Here, we find in the *Rosenblatt* case, that the Supreme Court considers the issue of "malice" and "public official" as jury issues.

In the case of *Time, Inc. v. Hill, supra*, the Supreme Court again reiterated its position taken in the *New York Times* case, and again points out that where public officials are involved:

"Factual error, contents defamatory of their official reputation, or both, are insufficient for an award of damages for false statement unless actual malice—knowledge that the statements are false or in reckless disregard of the truth—is alleged and proved.

Significantly, the *Rosenblatt* case, likewise, assigns to the jury for determination the question of "actual malice," an assignment which was denied the appellant in the judgment of the trial court.

In the case of *Curtis Publishing Co. v. Butts* (1967), *supra*, the Supreme Court made a sweeping review of its foregoing decisions, among others, and in so doing, it stated in part, that:

"These similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were—Butts and Walker,—viewed in light of the principles of liability which are of general applicability in our society, lead us to the conclusion that libel action of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interest at stake. We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

The court further stated that the *Butts* jury

"was instructed, in considering punitive damages, to assess 'the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions.' These considerations were said to be relevant to a determination whether the defendant had proceeded with 'wanton and reckless indifference.' In this light we consider that the jury must have decided that the investigation undertaken by the *Saturday Evening Post*, upon which much evidence and argument was centered, was grossly inadequate in the circumstances."

It is clear from the decision of the Supreme Court in the *Butts* case above, that the libel judgment in favor of Butts should be affirmed because the record of the trial court supports the finding that the Curtis publication was negligent in its failure to check and verify the articles before publication. That there was no emergency existing that would justify the preclusion of such verification.

(b) Decisions of This Court

There are two more recent decisions of this court where the pertinent issues are discussed at length. They are the cases of *Washington Post Co. v. Keogh*, ___ U.S. App. D.C. ___, 365 F.2d 965 (1966), and *Afro-American Publishing Co. v. Jaffe*, ___ U.S. App. D.C. ___, 366 F.2d 649, 660 (1966). In the former case, the plaintiff was a congressman and the court was able to take judicial notice of his status as "public official." This court, in a discussion of the rationale underlying summary judgment, stated that:

"In deciding whether a genuine issue of fact is raised in any case, a number of general considerations are relevant. First, the right of trial by jury is at stake, so courts must be ever careful to grant summary judgment only when no issue of fact is controverted or turns upon a choice between permissible inferences from undisputed evidence. * * * This need for care has given rise to the valid generalizations that summary judgment must be denied when there is 'doubt' whether an issue of fact has been raised, and that summary judgment is not usually appropriate when the issue raised concerns a subjective state of mind."

The basis of the court's opinion rests on the federal doctrine—"that since public officials, including congressmen, are immune from liability for statements, however false and defamatory, made in the course of their official duty—the other side of the coin is that public officials do not have the same protection from libelous statements as private victims." Moreover, the Keogh complaint, together with his affidavits, failed to show that the "Post" was "reckless or negligent" in its failure to more closely monitor the articles appearing in Drew Pearson's columns.

In the *Afro-American* case, this court affirmed the award of compensatory damages against the Afro-American Newspaper. In its opinion this court said:

"The District Court characterized the charges as 'tending to bring the plaintiff into contempt, ridicule and disgrace in the community in which he operates his business.' The facts support this finding. The finding, if anything, applied a stricter standard of defamation than defendant was entitled to. Under the ultimate and broader standard a publication is defamatory if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community. Moreover, defamation turns on whether the communication or publication tends, or is reasonably calculated, to cause harm to another's reputation, and it is not necessary for plaintiff to prove that this was its actual result. * * * It suffices, in support of the judgment, that the column under discussion would be reasonably understood by the average reader in the community concerned to signify that plaintiff is a bigot, racially prejudiced, and scornful of the Negro race."

Thus, we have the recent ruling of this Court in the *Afro-American* case that newspapers are liable for their publications which tend or are reasonably calculated to cause harm to another's reputation.

The nexus that guided the Court in the *Keogh* case proceeded on a record totally void of averments or affidavits, tending to show that the publications were made with reckless disregard of their falsity.

On the basis of the foregoing decisions, the entry of summary judgment by the trial court in the case at bar was clearly erroneous.

III. THE RECORD CONSIDERED AS A WHOLE DISCLOSES GENUINE FACTUAL ISSUES FOR TRIAL DETERMINATION

An analysis of the record on file in this court shows, among other things, that paragraph 5 of the amended complaint alleges that:

"The defendant, Evening Star did, on May 3, May 6, and May 24, 1964 libel and defame the plaintiff herein that the defendant, recklessly contriving and intending to injure the plaintiff and destroy his reputation as an effective public relations counselor, and to expose him to public hatred, contempt, ridicule and disgrace, and to induce an evil opinion of him in the minds of his clients, prospective clients, his colleagues, and the

citizenry of the community; did maliciously, wickedly and wilfully, through its newspaper, print, publish, sell, circulate and distribute certain statements which did defame this plaintiff's name, good reputation and character."

The published articles are set out in detail in paragraph 6 of the amended complaint. (App p 3)

The pre-trial examiner's order states with clarity the factual issues joined for trial determination. (App. p. 14)

In accordance with pre-trial examiner's order, the appellant filed in the court below the following list of witnesses and itemization of damages.

1. Witnesses:

- (a) Scott L. Kirkpatrick - 1330 Mass. Avenue, N.W.,
Washington, D. C.
- (b) Jesse O. Dedmon - 612A - 5th Street, N.W.
Washington, D.C.
- (c) Patricia McGerr - 5415 Conn. Ave., N.W.,
Washington, D.C.
- (d) C. Sumner Stone - 7605 Morningside Drive, N.W.,
Washington, D.C.
- (e) All persons listed as candidates on the official
Democratic Ballot.
- (f) John Wilkins, 3300 Pennsylvania Drive, Landover,
Maryland.
- (g) Gibson Wright, Manager of Public Relations for
Safeway Stores, 6700 Maryland Blvd., Landover,
Maryland.
- (h) Robert Robinson, News Reporter, 1236 Shepherd
Street, N.W., Washington, D.C.
- (i) Stanley House, 2135 Wisconsin Ave., N.W.,
Washington, D.C.

- (j) Clarence Hunter, Reporter for the Evening Star Newspaper.
- (k) Martin Powers, Public Relations Counselor, Dudley-Anderson-Yutsey, 1523 L Street, N.W., Washington, D.C.
- (l) Melvin White, U. S. Public Health Service, Public Information Officer, Department of H.E.W., Washington, D.C.
- (m) Arnold Sternberg, Attorney, Southern Building, Washington, D.C.
- (n) Rueben Clark & Samuel Lanaham, Attorneys, 900 - 17th Street, N.W., Washington, D.C.
- (o) John Hinkel, 822 National Press Building, Washington, D.C.
- (p) Clifford Guest, c/o Hill & Knowlton, 1735 K Street, N.W., Washington, D.C.
- (q) Grace Bassett, Reporter for the Evening Star Newspaper.
- (r) Sam Eastman, Newswriter for the Evening Star Newspaper.

2. Itemization of damages:

- (a) Safeway Stores contract, \$12,000.00 per year, 3 years with option to renew. Total: \$72,000.00.
- (b) The Wilkens Coffee Co. contract, \$20,000 per year, \$60,000.00 for three years. Total \$60,000.00.
- (c) The Roger-Wilkins Flour Co. contract, \$12,000.00 per year, contract for three years: \$36,000.00.
Total: \$36,000.00.
- (d) American Motors Inc., Dudley-Yutsey-Anderson, Washington representative. Total: \$50,000.00.
- (e) Prospective Loss due to libelous publication: \$100,000.00.

Appellant contends that the motive for the libelous publications stemmed from the following letters written to him by the editor of appellee's newspaper under dates of January 18 and January 31, 1961, and contained as exhibits in his affidavit filed on June 6, 1967. (App. p. 29)

The contents of letter dated January 18, 1961, are as follows:

"Dear Mr. Thompson:

"We have recently received a number of letters and telephone calls relative to The Star's handling of racial matters, and I have now secured a copy of a letter circulated by you which obviously inspired them. I am astonished that a person in your position would sign his name to such a document.

"As you must know, The Star never has had and does not now have a policy of discrimination against news or photographs of Negro affairs, social or otherwise. We cannot undertake to run every picture submitted to us by every press agent in town. But we can and do select the best pictures available to us without regard to race.

"It is true that no Negroes currently are employed on our news staff. It is also true, however, that we have no policy which prevents us from hiring qualified reporters of any race.

"The statement in your letter that Mr. McKelway and I declared a contrary position on January 9 (or any other date) must have been known by you to be incorrect. You have never discussed the matter with either of us, and no one at The Star could have represented us as laying down a policy which in fact is precisely contrary to our practice.

"We consider that your letter of January 10 is libellous, and will hold you accountable for any injury which The Star may suffer as a result of its continued circulation.

"Very truly yours,

/s/ Newbold Noyes, Jr.

"Newbold Noyes, Jr.
"Executive Editor"

The contents of the said letter under date of January 31, 1961 are as follows:

"Dear Mr. Thompson:

"I have tried to make plain how I feel about the letter circulated by you regarding The Star's racial policies. In view of the fact that this gratuitous and fraudulent attack has been your sole contribution in the matter, it seems clear to me that you have forfeited all claim to consideration as a participant in constructive discussion of this or any other question.

"I have recently had a number of friendly and profitable talks with persons who had been upset by your letter. I shall of course be glad to meet with any such groups in the future, including other members of the committee you mention. I regret, however, that your conduct in this incident prevents me from extending a like invitation to you as an individual.

"Very truly yours,

/s/ Newbold Noyes, Jr.

"Newbold Noyes, Jr.

"Executive Editor"

The above letters drew the following comment, published in the Pittsburgh Courier Newspaper under date of November 16, 1963, in a column described as "Washington Dateline," written by Robert L. Robinson: "The Courier also was informed that Dolphin Thompson, a D. C. Public Relations figure, has very little chance of gaining this post. A member of the D. C. Democratic Assembly said Mr. Thompson will not get that group's Negro support for many reasons. Also, a daily newspaper has sworn to tear Mr. Thompson apart if he ever seeks any kind of public office." (See, also, App. p. 32)

The affidavit of the appellant fully evaluates and lays the finger on the appellee as the responsible party. (App. p. 29) Moreover, the affidavits of appellee in support of its motion for summary judgment disclose that the affiants consulted with Newbold Noyes before publication of said statements.

The foregoing shows beyond question that a basis of actual malice and animosity is exhibited by editor Newbold Noyes of the appellee's Evening Star Newspaper against the appellant, and it demonstrates the appellee's opposition to social change and the extension of equal opportunities to persons of color in the District of Columbia. This venom is translated in the defamatory statements charged in appellant's amended complaint.

The record likewise shows that this ill will and this vengeance were knowingly and recklessly directed to the appellant in describing him as a "Black Muslim" in appellee's defamatory publications. That the application of the phrase "Black Muslim" to a person of color, who does not believe in, or subscribe to such bigoted philosophy, or doctrine of racial hate, is the most detestable and opprobrious appellation existing in America today. Such reference and such description subject a person, who is a non-believer, to the position of an advocate of racism and as a consequential supporter of the civil code of conduct that is an "eye for an eye."

This court has declared that such reference and publication are libelous. In the *Afro-American* case, *supra*, this court observed that such a column "would be reasonably understood by the average reader in the community concerned, to signify that plaintiff is a bigot, racially prejudiced, and scornful of the Negro (white) race."

The *Afro-American* newspaper was held liable for such publication where it charged a white man, operating a business in a largely Negro populated community, with prejudice toward Negroes. Here the shoe is on the other foot. And where the shoe is on the other foot, the same doctrine applies.

This court has so held in the case of *Washington Post Co. v. Keogh*, *supra*. There, this court stated:

"That since public officials, including congressmen, are immune from liability for statements, however false and defamatory, made in the course of their official duty. * * * The other side of the coin is that public officials do not have the same protection from libelous statements as private victims."

If, as the appellee pleaded in its answer, qualified privilege and truth, these defenses raise factual issues for trial determination. There is no facet in appellee's defense that squares with either the *New York Times* case, *supra*, the *Butts-Walker* cases (388 U.S. 130) or the *Keogh* case.

There is basically no distinction between the case at bar and the *Afro-American* case, *supra*.

The record considered as a whole, therefore, entitles the appellant to a trial on the merit.

CONCLUSION

In the light of the overwhelming weight of Federal authorities, as evidenced herein above, the appellant urges the court to reverse the judgment below and remand the cause to the District Court for a trial on the merits.

Respectfully submitted,

CHARLES P. HOWARD, JR.

815 - 5th Street, N. W.
Washington, D. C. 20005

Attorney for Appellant

(i)

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DOLPHIN G. THOMPSON
4724 Southern Avenue, S. E.
Washington, D. C.

Plaintiff

v.

THE EVENING STAR NEWSPAPER COMPANY
225 Virginia Avenue, S. E.
Washington, D. C.

and

THE WASHINGTON DAILY NEWS CO., INC.
1013 - 13th Street, N. W.
Washington, D. C.

Defendants

Civil Action
No. 2011-64

RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>
1967	
Feb. 21	List of witnesses for plttf.; c/m 2-21. filed
Mar. 16	Motion of deft. #1 for summary judgment; statement; P&A; affidavits (4); c/m 3-16; M.C. 3-16. filed
Mar. 16	Oral motion of pltf for continuance heard and granted to April 3, 1967. (AC/N) (Reporter: B. A. Williamson) Curran, C.J.
Apr. 5	Stipulation extending to 4-14-67 time for pltf to oppose motion for summary judgment. filed
Apr. 14	Opposition of pltf to 2nd motion of deft #1 for summary judgment. filed
May 23	Order granting deft's motion for summary judgment. (N) AC/N McGarraghy, J.
Jun 6	Motion of plttf to alter or amend judgment and or order; c/m 6/6/67; P&A; affidavit; exhibits a, b, and c: MC filed
Jun 14	Opposition of deft #1 to motion of plttf to alter or amend judgment; c/m 6/14/67. filed

<u>Date</u>	<u>Proceedings</u>
1967	
Jun 19	Notice of Appeal of plttf from order of 5/23/67; copy mailed to Francis L. Casey, Jr.; deposit of \$5.00 by Thompson. filed
Jun 19	Order denying motion of pltf to amend or alter judgment and/or Order of May 23, 1967. (N) McGarraghy, J.
Jun 23	Motion of Deft. to dismiss motion of appeal; P. & A.; c/m 6/23/67 MC. filed
Jun 26	Cost bond on appeal of pltf. in amount of \$25.00 with National Surety Corp. Approved. (Fiat) Jones, J.
Jun 29	Opposition of pltf. to defts. motion to dismiss notice of appeal; c/m 6-29-67 filed
Jun 30	Order denying as being without merit and without jurisdiction the motion of Plaintiff to alter or amend the judgment. (N) McGarraghy, J.

[Filed Aug. 26, 1964]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, The Evening Star Newspaper Company, and moves the Court for summary judgment pursuant to Rule 56 F.R.C.P. and for reason therefor refers the Court to the memorandum of points and authorities, statement of material facts not in dispute, and exhibits attached hereto and prayed to be read as a part hereof.

HOGAN & HARTSON

By /s/ Edmund L. Jones

By /s/ Paul R. Connolly

By /s/ David N. Webster

Attorneys for Defendant The Evening
Star Newspaper Company
800 Colorado Building
Washington 5, D. C.

[Filed Oct. 16, 1964]

**AMENDED COMPLAINT FOR DEFAMATION
OF CHARACTER AND FOR DAMAGES**

1. Comes now the plaintiff, Dolphin G. Thompson, by and through his attorney, King David, and states to this Honorable Court the following matters and things:

2. The jurisdiction of this Court is based upon the fact that the amount in controversy exceeds ten thousand dollars (\$10,000.00), exclusive of interest and costs.

3. For a long time prior to the grievances complained of herein, the plaintiff was a man of good character and reputation, and was a professional businessman, engaged in the Public Relations Business. Plaintiff enjoyed the respect, confidence, trust and esteem of his clients, his colleagues and the citizenry of this community.

4. The defendant, Evening Star Newspaper Company is a corporation located and doing business in the District of Columbia and the metropolitan area. Its newspapers are printed, published, sold, distributed and widely circulated.

The defendant, Washington Daily News Company, Inc. likewise is a corporation located and doing business in the District of Columbia and the metropolitan area. Its newspapers are printed, published, sold, distributed and widely circulated.

5. The defendant, Evening Star did on May 3, May 6, and May 24, 1964 libel, and defame the plaintiff herein in that the defendant, recklessly contriving and intending to injure the plaintiff and destroy his reputation as an effective Public Relations Counsellor, and to expose him to public hatred, contempt, ridicule, and disgrace, and to induce an evil opinion of him in the minds of his clients, prospective clients, his colleagues, and the citizenry of the community; did, maliciously, wickedly and wilfully through its newspaper, print, publish, sell, circulate and distribute certain statements which did defame this plaintiff's name, good reputation and character.

Each of the aforementioned published articles are attached hereto as Exhibits 1, 2, and 3.

6. The defendant, Evening Star did print and publish on May 3, 1964 an article entitled "Special Report" - "The War of the D. C. Democrats", which stated amongst other things the following: "Crusade for a Better Washington - This new group was organized by Dolphin Thompson, a public relations man, and John Thornton, a labor official. Both are Negroes. Their candidate for committeeman is Jesse O. Dedmon, a Negro lawyer, and for committeewoman, Patricia McGerr, a white writer. There are only three white candidates on the 24-member ticket for the party committee. Dedmon candidates disparage Mr. Jackson and Mr. Reeves as 'straw men' for white politicians."

"In the Dedmon camp Mr. Thompson and Mr. Thornton were ambitious for Negroes to build their strength in the Democratic Party. Mr. Dedmon probably was more "picked" than any other candidate, -but the men who picked him were also Negroes. As his group organized, he left all the talking to his two strategists, Mr. Thompson and Mr. Thornton. They promised to attack Negro candidates who let themselves be used by white leaders."

"Attractive Alliance"

"No stranger to racial appeals, Mr. Thompson once had been chief local spokesman for Malcolm X and his Black Muslim Mosque. He had tried to impeach Mr. Jackson as president of the National Association for the Advancement of Colored People after a stormy election which created enmities now reappearing in the Democratic strife."

"The problem was that the Sternberg people wanted Mr. Dedmon and some of his followers, but not Mr. Thompson or Mr. Thornton."----

"This Sternberg-Reeves coalition left the Dedmon forces with no choice but to run as an independent slate with no established white Democratic leader aboard."

"----- Mr. Dedmon has escaped this kind of attack because he is running on an almost all-Negro ticket. He has been criticized, however, on the grounds that he is dominated by Mr. Thompson

and Mr. Thornton, that he and many members of his slate lack political experience and that his ticket is not racially balanced.-----"

The defendant, Evening Star, published an editorial on May 6, 1964 entitled "Old Guard Victory" in which was stated among other things, the following:

"Certainly the large lead which the Rev. E. Franklin Jackson has built over Frank Reeves for Democratic National Committeeman speaks well for the maturity and good judgment of District voters. So does the total rejection of the Dedmon slate, with its blatantly racist appeal."

The defendant, Evening Star, on May 24, 1964, published a letter to the Editor written by the plaintiff. In a note to said letter the defendant's Editor stated the following: "Editor's Note:"

"The Star referred editorially, after the election, to the 'total rejection of the Dedmon slate, with its blatantly racist appeal.' Mr. Thompson as chief spokesman for the Dedmon group, had on several occasions attacked the Rev. E. Franklin Jackson, who won the race for National Committeeman, as an 'Uncle Tom' candidate hand-picked by the white political bosses". "The Star believes that to many of his hearers, as to us, this sort of remark constituted an appeal to racial prejudice."

7. The defendant, The Washington Daily News, on Monday, May 4, 1964, published an editorial captioned "The Primary" in which was stated among other things the following: (Exhibit #4)

"In all the elbowing by three groups vying for party control, Negro Democrats have been heard calling white fellow Democrats 'masters' (in the Simon Legree sense) and other colored fellow Democrats 'Uncle Toms', while some of the out of town pitchers of mud pies in the local primary have been denounced as 'outsiders' in a tone better suited to the word 'carpet-bagger' — colored carpetbagger, that is."

"The third group isn't going anywhere, as far as we can see. We can't figure out whether its slight Malcolm X tinge is a help or a handicap to it."

8. Plaintiff does not rely solely on the matter set forth above verbatim, additionally plaintiff alleges that he was libeled by all the articles published by both defendants in their entirety.

9. Plaintiff states that the articles complained of were published with malice and with a purpose to injure plaintiff and that said publication was made on the part of both defendants because of their prejudice against plaintiff, a colored man.

10. Plaintiff states that all the published articles had the desired, designed effect of injuring the plaintiff.

11. Plaintiff was an organizer and a supporter and a backer and a spokesman for the Dedmon slate. Additionally plaintiff was Public Relations Counsellor to the Dedmon Slate.

12. All the published articles were widely circulated in the metropolitan area and elsewhere, and the same were vicious and untrue and the defendants knew them to be such at the time of publication.

13. Both defendants knew or should have known the infamous reputation enjoyed by Malcolm X who is or was at the time the articles were published, a member of the Black Muslim Sect, which is an extreme racist organization that characterizes all white men as devils. Both defendants knew or should have known that Malcolm X advocates racial strife and violence, believing in an "eye for an eye", "a tooth for a tooth", and a "life for a life".

That at the time the defendants and each of them did print, publish, sell, circulate and distribute each of their respective newspapers which contained the libelous matter, the defendants and each of them knew the statements to be false and untrue.

14. That the defendants and each of them were motivated by profit, oppression, ill-will, prejudice and fraud. That malice and defamation were at all times intended by each defendant to operate, produce and inflict harm, loss, and damage to and upon the name, reputation, character and the profession practiced by this plaintiff and the desired end was accomplished.

The publications complained of herein are part of a calculated, long-standing policy of racial segregation and discrimination practiced by the defendants.

15. That as a result of the matters complained of herein, the plaintiff has been greatly harmed and damaged in his good name, reputation, character and in his career and in his standing in the community wherein he resides. That the plaintiff has suffered great monetary loss and will continue so to do.

WHEREFORE, plaintiff demands judgment against the defendants jointly and severally in the amount of forty-two million dollars (\$42,000,000.00) as compensatory damages.

And plaintiff demands judgment against the defendants jointly and severally in the amount of forty-two million dollars (\$42,000,000.00) as punitive damages.

/s/ King David

Attorney for Plaintiff
1916 - 11th Street, N. W.
Washington, D. C.

Plaintiff demands a trial by jury.

/s/ King David

[Certificate of Service]

SPECIAL REPORT

The War of the D. C. Democrats

It was December 22—the day politicians all over the country ended the month-long moratorium on campaigning after the assassination of President Kennedy.

Frank Reeves had asked six leading District Democrats to come to his house on upper Sixteenth street that evening. Mr. Reeves, a Negro and Democratic National Committeeman for the District, had something to say.

The Democrats he called were all Negroes, too, except for Joseph Rauh, the undisputed leader of the local party organization. None knew what Mr. Reeves had on his mind. But all were aware that the time to organize for the 1964 primary campaign was upon them. They also knew that their usually harmonious party organization had been in a state of tension since October, when Mr. Rauh told Mr. Reeves that he would not support him for re-election as committeeman.

After Mr. Rauh, the last to arrive, entered the room, Mr. Reeves sat down on the hearth and read a statement he said he was going to make public. It disclosed that he had decided to step out of the race for committeeman.

Two days later, on Christmas Eve, Mr. Reeves made the withdrawal public. A portent of the troubles to come for the Democratic organization could be seen in the fact that the six party leaders who had been briefed at his fireside immediately split: Four of them, including the Rev. E. Franklin Jackson, a party vice chairman, rallied around a Jackson candidacy for the national committee post; two of them remained loyal to Mr. Reeves and insisted that he should reconsider his withdrawal.

With Mr. Jackson, no longer bound by a long-standing pledge to support Mr. Reeves, were Mr. Rauh and William L. (Pete) Porter, a lawyer, and John K. Rector, a businessman.

Kenneth Kennedy, a real estate man, and Mrs. Willie Hardy, captain of the city's largest Democratic precinct, started to stomp the city for Mr. Reeves.

What was this split all about?

The Reasons

It was partly, of course, the decision of the old-line party leaders to break with Mr. Reeves.

It also marked the start of an effort

by a group of white insurgents to gain a larger voice in party control.

And it brought to the surface a growing impatience on the part of Negroes making up a majority of the District's population—to take over party leadership.

These pressures and possibly others combined to kill any thoughts of a unified Democratic Party in the District primary to be held on Tuesday. The result is three separate, bitterly disputing slates, which stack up as follows:

United Democrats for Johnson—Mr. Rauh is the leader of this organization and most incumbent party officers are on its slate, which is topped by Dr. Jackson and Polly Shackleton, present national committeewoman.

This group fought its way to power on a Humphrey-for-President ticket in 1960 and it is the local Liberal Establishment.

Convention Democrats—A coalition erected by Mr. Reeves and Arnold Sternberg, a rebel party officer. Their ticket was nominated at a convention of representatives from the city's 91 precincts. Concentrating on District issues, they claim the Rauh-Jackson

group has hoarded power and not permitted enough little "d" democracy in the party.

Crusade for a Better Washington—This new group was organized by Delphin Thompson, a public relations man, and John Thornton, a labor official. Both are Negroes. Their candidate for committeeman is Jesse O. Dedmon, a Negro lawyer, and for committeewoman, Patricia McGerr, a white writer. There are only three white candidates on the 24-member ticket for the party committee. Dedmon candidates disparage Mr. Jackson and Mr. Reeves as "straw men" for white politicians.

The tough three-way fight now wracking the Democrats contrasts sharply with what might have been had Mr. Reeves and Mr. Rauh not split. Then the party had every reason to expect that a slate of candidates dominated by the Rauh-led incumbents would have triumphed in the primary, probably challenged only by a few dissidents without broad support. But the split saw Reeves become a rallying point not only because of his personal popularity but because of a

See DEMOCRATS, Page A-11

DEMOCRATS

'Dump Reeves' Campaign Led to Party Split And Set Up 3-Way Contest for Control

Continued From Page A-1
simmering discontent with the white leadership of a party which was now a predominantly Negro membership.

The Tax Scandal

A crucial day for Mr. Reeves and the party was June 27, 1961. He had been nominated by President Kennedy to become the District's first Negro Commissioner. But when he went to the Senate for hearings on his confirmation, he was exposed as a tax delinquent.

Senators confronted him with evidence of tardy tax payments on three occasions. They asked him if there were any other delinquencies. He said he couldn't recall any.

But a search of the record revealed six other tax liens filed either against him or his law practice. All had been settled or withdrawn. Also, his District income tax return for 1960 was dropped into the mail the morning he testified—late by more than two months.

Mr. Reeves assured the Senate District Committee that the late payments were "solely and entirely due to my financial embarrassment, my inability to pay."

After the Senate hearings, President Kennedy withdrew the Reeves nomination. And John Duncan became the first Negro Commissioner.

For two years after that episode Mr. Rauh rejected the arguments of those who wanted to remove Mr. Reeves from his leadership post. These included two of the biggest Democratic committeemen race to Mr. Reeves by 300 votes in 1960, and former District Commissioner F. Joseph (Jiggs) Donohue.

But as the 1964 campaign year approached, Mr. Rauh became convinced that his organization could not boast of a clean record if Mr. Reeves and his tax difficulties remained on the slate.

In October Mr. Rauh told Mr. Reeves he would not be able to support him in a bid for reelection. He said that Mr. Reeves could run, but that if he did and carried most of the incumbents with him, Mr. Rauh would resign from party office. That was the situation the night of the December fireside meeting at which Mr. Reeves bowed out.

There was a wave of reaction among many party members—most of them Negroes—against what was interpreted as a "dumping" of Mr. Reeves. Directly after the meeting in the Reeves home, Mr. Kennedy and Mrs. Hardy went back to their home neighborhoods to determine whether the people shared the leadership's disillusionment with Mr. Reeves.

They thought that if they found he could win he should run.

At the grass roots, they later reported, they found strong sympathy for Mr. Reeves. He was seen as a victim of white officialdom—discredited by the Senators, cast off by the white leader of his own party.

Many Negro voters told the Kennedy-Hardy scouts that Mr. Reeves had been persecuted for tax troubles he couldn't avoid. Many Negroes made this judgment, too: That white leaders had conspired to mortify Mr. Reeves in order to postpone the political ascendancy of his race in the District.

Meredith Steps In

Sentiment for Mr. Reeves was fanned by a newcomer to the Washington scene, James Meredith. Fresh from a racial victory at the University of Mississippi, Mr. Meredith said the issue facing the Democrats in the coming primary was whether the Negro would choose his own leaders or whether the Negro "leader" would be picked by the white power structure.

Friends urged Mr. Reeves to fight back at "officialdom," to resist "bossism." Assured by the Kennedy-Hardy team that he could win, Mr. Reeves jumped back into the race.

The Rauh camp, meanwhile, had regrouped around Mr. Jackson as the leader of their slate. Whether he was "picked" or not by the white leaders is a subject of argument. He had been eager to run for national committeeman. Once Mr. Reeves' withdrawal freed him

Democrats leery of Mr. Reeves were also afraid the party would be handicapped at the polls by the reputation of its leadership as ultra-liberal. They insisted that all segments of the party be represented in a new slate of candidates.

And they got representation for labor, for business and for precinct workers. Mr. Turner was promised a spot on the 26-member committee slate along with 10 labor officials, many of his own choosing. Milton Kronheim, wholesale liquor dealer and generous party contributor, joined the Rauh group. The most controversial party policy—a strong pro-subway and rapid rail position—was modified to include more highway. This was a welcome adjustment to both Mr. Donohue and Mr. Kronheim, who serve on a "balanced transportation committee" with bus company president O. Roy Chalk.

Both Commissioners Tobriner and Duncan promised to lend the advantage of their names to the leadership slate.

Prospective Rauh candidate

regrouped with a political eye on a reservoir of Democratic strength in northwest Washington, where voter registration and turnout have been traditionally high. These Democrats live in predominately white neighborhoods. Now, an estimated 40 per cent of registrants in the District are white and 60 per cent colored.

Two New Factions

Meanwhile, the party turmoil brought two new factions to the surface—those headed by Arnold Sternberg and Dolphin Thompson and John Thornton.

Mr. Sternberg had been organizing for a year. Both began the campaign year by attacking a "power clique" within the party. And for weeks allies of the two insurgent leaders negotiated in an attempt to shape a single opposition team. The attempt was futile because of conflicting ambitions, interests and tactics.

Mr. Sternberg, a lawyer, at one time had ambitions to become a District Commissioner. He had an unusual knowledge of District affairs. He was convinced that party officers, the city's only officials elected by a majority of voters, must make city policy and that the Commissioners must lead, not simply balance conflicting interests.

In precinct after precinct Mr. Sternberg found workers who were impatient for a greater voice in party policy. He attracted neophytes drawn to the party by the fact that it had "for real." The enthusiastic newcomers included Frank Luchs, a real estate developer with no love for Mr. Rauh; Reuben Clark, a housing official and friend of Mr. Sternberg, and Samuel (Jack) Lanahan, a lawyer with an interest in welfare problems.

In the Dedmon camp, Mr. Thompson and Mr. Thornton were ambitious for Negroes to build their strength in the Democratic party. Mr. Dedmon probably was more "pleased" than any other candidate—but the men who picked him were also Negroes. As his group organized, he left all the talking to his two strategists, Mr. Thompson and Mr. Thornton. They promised to attack Negro candidates who let themselves be used by white leaders.

Attractive Alliance

No stranger to racial appeals, Mr. Thompson once had been chief local spokesman for Malcolm X and his Black Muslim Mosque. He had tried to impeach Mr. Jackson as president of the National Association for the Advancement of Colored People after a stormy election which created enmities now reappearing in the Democratic strife.

The militant tactics favored by Mr. Thompson and Mr.

Thornton made their prospective partners in the Sternberg camp nervous. But the presence of Miss McGerr and Scott Kirkpatrick, manager of the National Theater, in the Dedmon group made an alliance attractive, as did Mr. Dedmon's presidency of the Chamber of Commerce, the Negro businessmen's organization in the District.

The Sternberg forces approached the Dedmon forces repeatedly, with no decision. Then Mr. Dedmon announced a slate, but members understood that an alignment with Mr. Sternberg might push them off.

The problem was that the Sternberg people wanted Mr. Dedmon and some of his followers, but not Mr. Thompson or Mr. Thornton.

One night Mr. Sternberg set up a meeting with Dedmon and Reeves supporters on neutral ground—the office of Belford Lawson, a Negro attorney. But the Dedmon people refused to stay there, so the group moved to the office of David Byrd, a Negro architect. The evening ended in a shouting match with nothing settled.

Flaxie Pinkett, respected civic leader and a winner of the Howard University "achievement award" this year, was receptive to the Sternberg overtures. But her first loyalty was to Mr. Reeves.

Frustrated by the Dedmon forces and paralyzed by the loyalty of Mr. Reeves' friends, the Sternberg group finally tied up with Mr. Reeves just hours before a city-wide convention.

Mr. Reeves for national committeeman and socialite Scottie Lanahan, the daughter of writer F. Scott Fitzgerald and wife of Jack Lanahan, for national committee woman. Mr. Reeves' presence on the ticket persuaded Miss Pinkett to run as alternate committeewoman candidate and John Sexton, a lawyer, ran for alternate committeeman.

On the Defensive

Then they managed to nominate and elect all their candidates at the convention of precinct workers.

This Sternberg-Reeves coalition left the Dedmon forces with a choice but to run as an independent slate with no established white Democratic leader aboard.

The campaign was on. Rauh liberals, used to demanding reforms, found themselves in the defensive position of trying to sell their own past record.

They had transformed the party in one year from a little liberal club to a powerful political force of 126,786 members, outregistering the Republicans four to one. But their first campaign shock was an attack, primarily from Negroes, on their liberalism.

The Rauh leadership had

discarded one Negro for another, it was said. That amounted to "desertion" of the one and "use" of the other—both moves "illiberal." Mr. Rauh, ironically, was the main target of the Negro independence he had done so much to build.

At one rally, for example, a Reeves man praised Mr. Rauh's civil rights record. There was approving applause.

"He has been a good master," the speaker continued. "But whether he has been a good master or a bad master, I say I don't want any master. I want to be free."

That brought shouts and cheering.

The Reeves-Lanahan candidates insisted that they reached people by focusing on the issues and by encouraging more citizen participation in both the city and the party. But never has one of their audiences been more responsive than when a candidate demanded recently: "Do you want to be run by those people west of Rock Creek Park?"

Multiple Attacks

In his campaigning Mr. Dedmon has denied that the Rauh group deserved credit for a fair housing ordinance, welfare reform or the civil rights march on Washington. Protest marchers and CORE, and members of his own slate forced the reforms, Mr. Dedmon maintains.

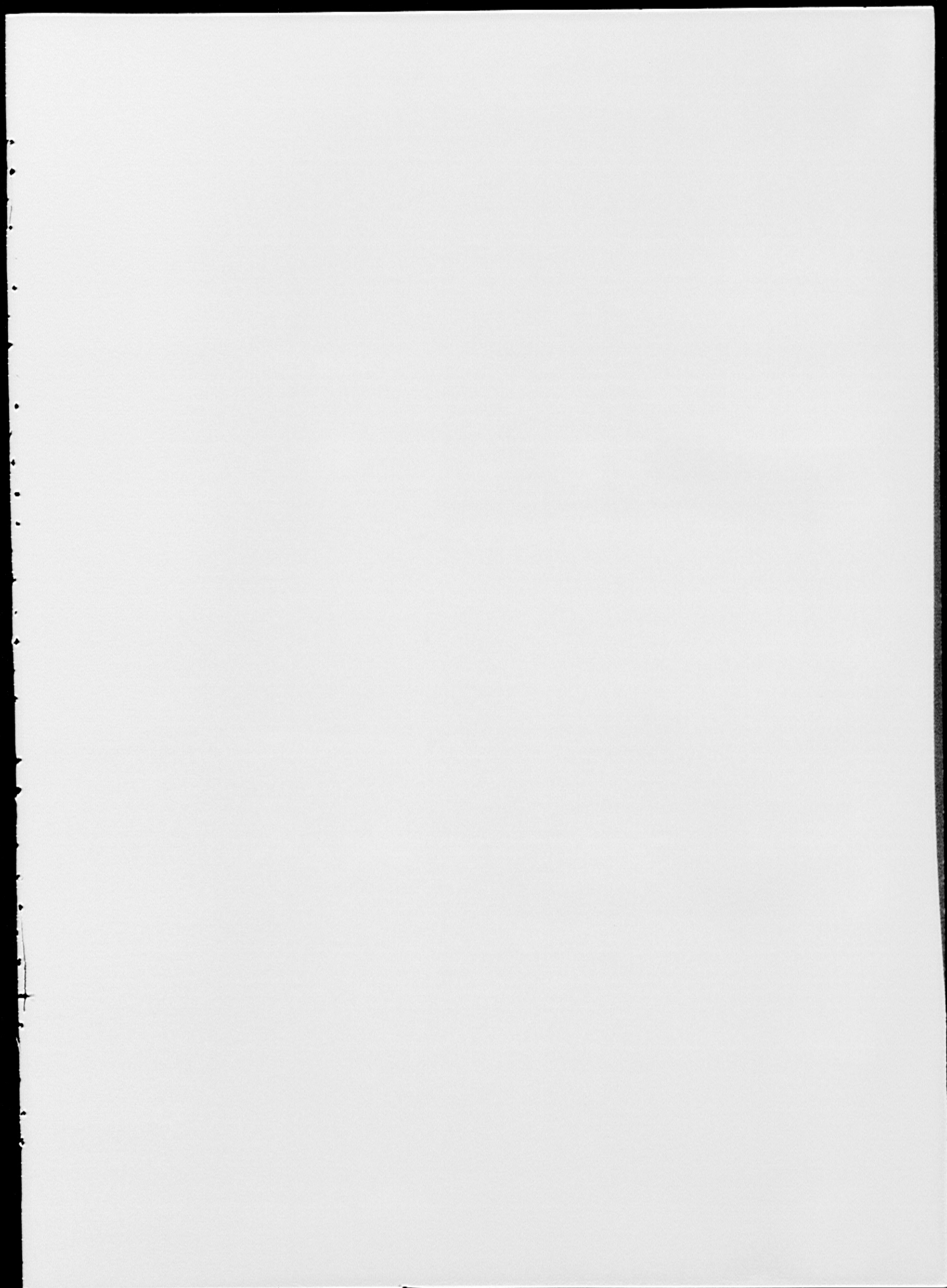
Jackson and Dedmon campaigners have attacked the white running mates of Mr. Reeves, too. They charge him for ment houses occupied mostly by white. They ignore the fact that Mr. Luchs helped start integrated redevelopment in the Southwest.

Nor have the campaigners stopped at making an epithet of the words "biracial co-operation." Mr. Jackson has just been tagged in a Dedmon "pink sheet" as a "race-baiter, favor-seeker, front man, public deceiver and shoddy character." Mr. Reeves continues to be characterized as a bumbler who may merit sympathy but not votes. Mr. Dedmon has escaped this kind of attack because he is running on an almost all-Negro ticket. He has been criticized, however, on the grounds that he is dominated by Mr. Thompson and Mr. Thornton, that he and many members of his slate lack political experience and that his ticket is not racially balanced.

In the face of all this, Democrats are somewhat dazed by what they have made of their first big primary campaign. The most optimistic assert that next Tuesday they will elect leaders who can balance all the party's interests, recognizing the growing impatience of the Negro majority.

Whoever is elected will have to reassemble the factions that now divide the party's tremendous new power.

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The Evening Star

With Sunday Morning Edition

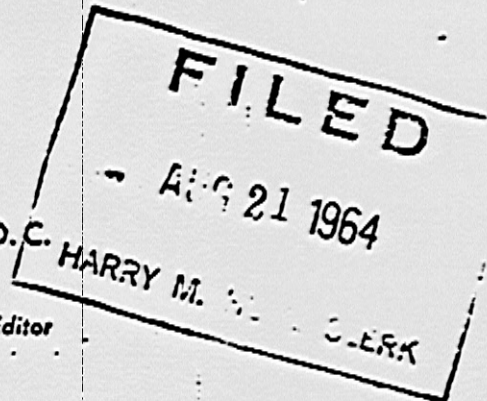
Published by THE EVENING STAR NEWSPAPER CO., Washington, D. C.

SAMUEL H. KAUFFMANN, Chairman of the Board

CROSBY N. BOYD, President

NEWBOLD NOYES, Editor

BENJAMIN M. McKELWAY, Editorial Chairman



A-18 **

WEDNESDAY, MAY 6, 1964

Old Guard Victory

While the tabulations are incomplete, the outcome of the District Democratic primary hardly appears to be in doubt. On the basis of returns counted shortly before noon, control of the party will almost certainly remain unchanged. Indeed, it appears that each of the major slates organized under the banner of the United Democrats for Johnson will emerge unbroken.

This is hardly surprising, in view of the prominence and familiarity of the old-line leaders. Among the slates as a whole, moreover, we think the United Democrats were by all odds the most deserving of support.

Certainly the large lead which the Rev. E. Franklin Jackson has built over Frank Reeves for Democratic National Committeeman speaks well for the maturity and good judgment of District voters. So does the total rejection of the Dedmon slate, with its blatantly racist appeal.

Despite the solid leads rolled up by each of the Rauh-Jackson slates, there obviously was a great deal of cross-slate voting. This fact contributed largely to the slowness of the count.

We had hoped that the cross-slate voting would have added several of the stronger candidates from other slates to the District Central Committee. Be that as it may, the vigorous campaign of the last several weeks has raised a good many questions about the conduct and functions of this influential group. We trust that in the future its activities will be more openly exposed to the citizens of the District.

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THE SUNDAY STAR
Washington, D. C., May 24, 1964

Primary Opinion

Now that the District of Columbia Democratic primary election is over and most reports are in, we know that your paper defamed the Jesse O. Dedmon, Jr.-Patricia McGerr candidates and caused the city's best Democrats to lose this very important election.

During the entire campaign no Dedmon-McGerr candidate mentioned race at any time. Your story on Sunday, May 3, 1964, "Special Report" without a byline lied several times. The Dedmon-McGerr ticket was composed of dedicated white and Negro citizens.

The intended inference that the Dedmon-McGerr ticket was connected with the Black Muslims was a libelous distortion unworthy of comment. My professional service, more than a year ago, to Malcolm X in arranging two news conferences did not make me a Black Muslim any more than it made your reporters, Mary McGrory and Clarence Hunter, who covered them. Your effort to further defame the Dedmon-McGerr candidates by editorializing them on May 6 as "blatant racists" shows sickness at The Star which may be the reason that you have only one Negro newsmen among several dozen.

Personally, I am of the opinion that this community must have a strong and dedicated Negro leadership who sees the problems and opportunities in Washington and have courage, intellect and patience to work with white leaders and citizens in and out of government to inspire and motivate the thousands of citizens both Negro and white to recognize and respect each other.

Moreover, I believe America's freedom is a militant freedom. It was America's militant quest for justice and fair play that exposed and crumbled the "McCarthy era," and today I think any white citizen who finds and puts to use a weak and subservient Negro is dealing with the most corroding and destructive commodity in America. I abhor men of this description because they are equally dangerous to the white as well as to the Negro community. There must be strong and creative Negro leadership for real political equality in the Nation's Capital, as it must be in the fight for equality in housing, employment and public accommodation.

Finally, your defamation of the Dedmon-McGerr candidates caused them to lose the election, but it did not stop this expanding interracial group of creative and dedicated citizens who see their community duty and have set themselves to improve this city.

My hope is that your paper ultimately will join these citizens because they think the root of most of D. C. problems are within the city limits, and we suggest your spending more effort to enlighten all people in the District of Columbia where your paper is located because we are part of the problems and we must be a part of the solution.

Dolphin Thompson.

Public Relations Counselor.

Editor's Note: The Star referred editorially, after the election, to "the total rejection of the Dedmon slate, with its blatantly racist appeal." Mr. Thompson, as chief spokesman for the Dedmon group, had on several occasions attacked the Rev. E. Franklin Jackson, who ran the race for National Committee man, as an "Uncle Tom" candidate "handpicked by white political bosses." The Star believes that to many of his hearers, as to us, this sort of remark constituted an appeal to racial prejudice.

Exhibit # 3

[Filed Nov. 4, 1964]

ANSWER OF DEFENDANT
THE EVENING STAR NEWSPAPER COMPANY
TO THE AMENDED COMPLAINT

First Defense

The complaint fails to state a claim upon which relief can be granted against this defendant.

Second Defense

1. The defendant admits that it is a corporation doing business in the District of Columbia and the Washington Metropolitan Area and that its newspapers are published and distributed in that area.

2. Defendant admits that on May 3, 1964, it published the Special Report attached to the complaint as Exhibit 1, that on May 6, 1964, it published an editorial entitled "Old Guard Victory" attached to the complaint as Exhibit 2, and that on May 24, 1964, it published a letter and an "Editor's Note" in the form of Exhibit 3 attached to the complaint.

3. The defendant denies that any of these publications contain libelous matter of and concerning the plaintiff and further denies that any of these publications were written with malice towards him.

4. The defendant has no information sufficient to form a belief as to the allegations of damages contained in the complaint and demands strict proof thereof.

5. All allegations not expressly admitted in this answer are denied.

Third Defense

The defendant asserts that the publications were published on conditionally privileged occasions without malice, expressed or implied.

Fourth Defense

The joinder of The Evening Star Newspaper Company and The Washington Daily News Company in the same action for allegedly separate libels is a misjoinder of parties.

Fifth Defense

The publications complained of are fair comment on a matter of public interest.

Sixth Defense

The First and Fifth Amendments to the Federal Constitution prohibit the assessment of damages for the publications complained of.

Seventh Defense

The publications complained of, when read as a whole, are substantially true.

Eighth Defense

The plaintiff, Dolphin Thompson, has no standing to complain of the publication on May 6, 1964.

Ninth Defense

The publication of May 6, 1964, cannot either factually or constitutionally be interpreted as applying to this plaintiff.

HOGAN & HARTSON

By /s/ Paul R. Connolly

By /s/ David N. Webster

Attorneys for Defendant, The Evening
Star Newspaper Company

* * *

[Filed Jan. 24, 1967]

PRETRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE: Action for damages for
defamation of character.

THE PLAINTIFF CLAIMS that the D Evening-Sunday Star Newspaper Company, a corporation doing business in the District of Columbia, and its environs, in the business of publishing, printing, selling, distributing newspapers, that the D printed, published and distributed on various dates the following articles, all of which are attached to the P's amended complaint in their entirety as far as is pertinent in this action:

May 3, 1964 entitled

"Special Report - the War of
the D. C. Democrats"

May 6, 1964 entitled "Old Guard Victory"

May 24, 1964 entitled "Primary Opinion"

The P asserts that the foregoing articles were published with malice and with a purpose to injure P; that said publication was issued because of D's prejudice against P, a colored man; that all the aforesaid articles had the desired design effect of injury of P; that they were widely circulated in the Washington metropolitan area and elsewhere; were vicious and untrue which the D knew to be such at the time of publication and distribution; that the D knew or should have known the infamous reputation enjoyed by Malcolm X who is, or was at the time the articles were published, a member of the Black Muslim Sect an extreme racist organization that characterizes all white men as devils and advocates racial strife and violence; that D was motivated by profit, oppression, ill will, prejudice and fraud and the aforesaid articles were intended to operate, produce and inflict harm, loss and damage to and upon the name, reputation, character and the profession, to wit, public relations counselor, practiced by the P.

P asserts that the desired ends of the D were accomplished and that as a result of the aforesaid articles P has been greatly harmed and damaged in his good name, reputation, character and in his career and in his standing in the community, Washington, D. C., where he resides, and that he has suffered great monetary loss and will continue to do so.

He therefore seeks to recover from the D the sum of \$42,000,000. compensatory and \$42,000,000. punitive damages.

THE ARTICLES OF WHICH P COMPLAINS ARE REPRESENTED BY COPIES THEREOF WHICH ARE ATTACHED TO HIS AMENDED COMPLAINT FILED OCT. 16, 1964.

The P asserts that allegations included in the aforesaid articles which were libelous are as follows:

May 3, 1964 "Special Report" - "The War of the D. C. Democrats", which stated amongst other things the following: "Crusade for a Better Washington - This new group was organized by Dolphin Thompson, a

public relations man, and John Thornton, a labor official. Both are Negroes. Their candidate for committeeman is Jesse O. Dedmon, A Negro lawyer, and for committeewoman, Patricia McGerr, a white writer. There are only three white candidates on the 24 member ticket for the party committee.. Dedmon candidates disparage Mr. Jackson and Mr. Reeves as 'straw men' for white politicians."

"In the Dedmon camp Mr. Thompson and Mr. Thornton were ambitious for Negroes to build their strength in the Democratic Party. Mr. Dedmon probably was more 'picked' than any other candidate - but the men who picked him were also Negroes. As his group organized, he left all the talking to his two strategists, Mr. Thompson and Mr. Thornton. They promised to attack Negro candidates who let themselves be used by white leaders."

"Attractive Alliance"

"No stranger to racial appeals, Mr. Thompson once had been chief local spokesman for Malcolm X and his Black Muslim Mosque. He had tried to impeach Mr. Jackson as president of the National Association for the Advancement of Colored People after a stormy election which created enmities now reappearing in the Democratic strife.....

"The problem was that the Sternberg people wanted Mr. Dedmon and some of his followers, but not Mr. Thompson for Mr. Thornton.".....

"This Sternberg-Reeves coalition left the Dedmon forces with no choice but to run as an independent slate with no established white Democratic leader aboard."

"..... Mr. Dedmon has escaped this kind of attack because he is running on an almost all-Negro ticket. He has been criticized, however, on the grounds that he is dominated by Mr. Thompson and Mr. Thornton, that he and many members of his slate lack political experience and that his ticket is not racially balanced....."

On May 6, 1964, entitled "Old Guard Victory" in which was stated among other things, the following:

"Certainly the large lead which the Rev. E. Franklin Jackson has built over Frank Reeves for Democratic National Committeeman speaks

well for the maturity and good judgment of District voters. So does the total rejection of the Dedmon slate, with its blatantly racist appeal:"

On May 24, 1964, published a letter to the Editor written by the P. In a note to said letter the D's Editor stated the following:

"Editor's Note":

"The Star referred editorially, after the election, to the 'total rejection of the Dedmon slate, with its blatantly racist appeal.' Mr. Thompson as chief spokesman for the Dedmon group, had on several occasions attacked the Rev. E. Franklin Jackson, who won the race for National Committeeman, as an 'Uncle Tom' candidate hand-picked by the white political bosses". "The Star believes that to many of his hearers, as to us, this sort of remark constituted an appeal to racial prejudice."

On May 4, 1964, published an editorial captioned "The Primary" in which was stated among other things the following:

"In all the elbowing by three groups vying for party control, Negro Democrats have been heard calling white fellow Democrats 'masters' (in the Simon Legree sense) and other colored fellow Democrats 'Uncle Toms' while some of the out of town pitchers of mud pies in the local primary have been denounced as 'outsiders' in a tone better suited to the word 'carpet-bagger' . . . colored carpet-bagger, that is."

"The third group isn't going anywhere, as far as we can see. We can't figure out whether its slight Malcolm X tinge is a help or a handicap to it."

The P claims that all of the allegations made hereinabove were in their references to him untrue and that the effect of them was to charge the P ran the "Dedmon slate" which was racist and which allegations were untrue, and that the claim that the P was the spokesman for the Black Muslims or for Malcolm X was untrue; that the statements that there were only three white people on the Dedmon slate were untrue, all of which is part and parcel of D's effort to portray the P in a bad light.

THE DEFENDANT on May 3, 1964, published the Special Report attached to the amended complaint as Exhibit 1. On May 6, 1964, it published an editorial entitled, "Old Guard Victory," attached to the amended complaint as Exhibit 2. On May 24, 1964, this D published a letter and an "Editor's Note" in the form of Exhibit 3 to the amended complaint.

The D denies that any of these publications contain matters that are libelous of the P or any libel concerning the P and it further denies that any of these publications were written or published with malice toward the P.

The D has no information sufficient to form a belief as to the P's allegations of damage and it demands strict proof of these allegations of damage.

All of P's allegations that are not specifically admitted by the D are denied.

The said publications were published with a conditional privilege and without malice expressed or implied. The said publications constitute fair comment on a matter of public interest. The First, Fifth, and Fourteenth Amendments to the U.S. Constitution prohibit an award of damages arising from the said publications.

The said publications, read as a whole, are substantially true.

The P has no standing to complain of the publication of May 6, 1964, which is attached to the amended complaint as Exhibit 2. The publication of May 6, 1964, cannot be factually or constitutionally interpreted as applying to the P.

The said publications were published without malice and without knowledge that they contained any matter that was erroneous.

STIPULATIONS

The parties agree to file with the Clerk of the Court and to mutually exchange, on or before Feb. 10, 1967, a list of the names and addresses of witnesses known to them, including expert witnesses, who have knowledge of any aspect of this case, indicating those who may be used at the trial. Impeachment witnesses are not to be included.

Counsel for P shall furnish the Clerk of Court and opposing counsel on or before Feb. 10, 1967 a written itemized statement of all the elements of the compensatory damages which will be educed at the trial.

The three articles referred to herein by the parties, or copies thereof, may be admitted in evidence at the trial.

A flyer and an official Democratic ballot initialed by Examiner, may be admitted in evidence at the trial without formal proof, subject to all legal objections.

A document initialed by Examiner marked "D" has been offered by the Defendant at Pretrial with the request that counsel for P admit same in evidence, but P's counsel will make no agreement with relation thereto.

Counsel for P has a number of newspaper articles initialed by Examiner marked "P" which he requests D counsel to agree may be admitted in evidence at the trial but D counsel will make no agreement with relation thereto.

The Examiner has requested counsel to appear at trial with the maximum amount of authority to settle this case which will be allowed them by their principals.

/s/
Pretrial Examiner

/s/ King David
Atty for P

Hogan & Hartson
/s/ Francis L. Casey
Atty for D

[Filed Mar. 16, 1967]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, by its attorneys, and moves the Court to enter summary judgment for the defendant in this action, pursuant to the provisions of Rule 56, Fed. R. Civ. P. As grounds for this motion, defendant states that there is no genuine issue as to any material fact and the defendant is entitled to a judgment against the plaintiff, as a

matter of law. All of which more fully appears in the attached statement of material facts, memorandum of points and authorities and affidavits, each of which is incorporated herein by this reference and is to be read as a part hereof.

Respectfully submitted,

HOGAN & HARTSON

By: /s/ Francis L. Casey, Jr.

By: /s/ Robert C. Maynard
Attorneys for Defendant

* * *

[Certificate of Service]

[Filed May 23, 1967]

ORDER

This cause came on for hearing at this term on the defendant's motion for summary judgment. Upon consideration of the said motion, the memoranda of points and authorities in support of and in opposition to the motion, the defendant's statement of facts as to which there is no genuine issue, the affidavits in support of the said motion, and the record in this case, it is this 23rd day of May, 1967,

ORDERED, that upon the Court's ruling that there is no genuine issue of fact and that the defendant is entitled to summary judgment as a matter of law, that the said motion be granted and the same is hereby granted.

/s/ Joseph C. McGarraghy
Judge

[Certificate of Service]

[Filed June 6, 1967]

MOTION TO ALTER OR AMEND JUDGMENT AND/OR ORDER

Now comes the plaintiff, Dolphin G. Thompson, pursuant to the provisions of Rule 59 (C) of the Federal Rules of Civil Procedure, and moves the court to alter or amend the judgment or Order entered herein on the 23rd day of May, 1967, and for reasons, therefore states:

1. That the attached affidavit of plaintiff, which is made part hereof by reference, discloses material facts clearly showing that the defendant's publications were motivated by actual malice and that the defendant "knowingly recklessly falsified in said publications".

2. That in the light of such disclosures, the court should reconsider and re-evaluate the record as a whole, and thereafter redetermine its judgment or Order entered herein on May 23rd, 1967.

3. That upon reconsideration of the Motion herein this court should evaluate and apply the "rationale" buttressing the sweeping discussion and review of the pertinent issues, by Mr. Justice Brennan, in the case of "Time, Inc. v. Hill," 385 U.S. 374 (1967).

4. That the Order of this court entered on May 23rd, 1967, not only deprives the plaintiff of his right to trial by jury, as guaranteed under the seventh amendment, but it also denies him due process of law provided under the fifth amendment to the Federal Constitution.

5. That by virtue of the above stated reasons the court should alter or amend the judgment or order entered herein on May 23rd, 1967, to the extent, that the plaintiff is afforded a trial on the merits of the issues joined by the pleadings herein.

6. That to entertain a motion for summary judgment, at this posture of the proceedings, vitiates the intendment of Rule 12 (b) of the Federal Rules of Civil Procedure.

7. And for other good and cogent reasons to be adduced at the hearing of the motion herein.

/s/ Dolphin G. Thompson
Plaintiff

* * *

[Certificate of Service]

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO ALTER OR AMEND ORDER
ENTERED HEREIN

1. Prefatory Statement:

This is a motion by the plaintiff to alter or amend the judgment or order of this court entered herein on the 23rd day of May, 1967. The order sought to be amended is the result of a motion by the defendant for summary judgment in its favor, under Fed. R.C.P. p. 56. The latter motion was filed on March 16, 1967 and granted on May 23rd, 1967.

The action, as disclosed by the amended complaint, is one for libel, and sought both compensatory and punitive damages. The defendant contended in its motion for summary judgment that the application of the principle announced in "New York Times Co. v. Sullivan," 376 U.S. 254 (1964) requires that it have summary judgment. That principle is as follows: (376 U.S. at 279-280):

"The constitutional guarantees require, we think, a Federal Rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not". The plaintiff here contends that his attached affidavit has supplied material evidence of "actual malice" on the part of the defendant and that this material evidence presents a genuine factual issue for trial determination, as to "actual malice."

It may be noted that the "Sullivan" opinion (376 U.S. at 292, N. 30): further observed that: "since the fourteenth amendment requires recognition of the conditional privilege for honest misstatements of fact. It follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice—."

Even if the plaintiff were to concede "arguendo" that he was public official within the language of "New York Times vs. Sullivan," *supra*, it

would be inconceivable to assert, that what is said or printed concerning such a man should be given less protection under the first amendment than that afforded the defendants in the Sullivan decision. The preponderance of authorities is against the defendant, and in favor of the plaintiff in the case at bar. See, *Rosenblatt vs. Baer*, 383 U.S. 75, 86 (1966), *Pauling vs. News Syndicate Co.*, 2d Cir., 335 F.2d 659, 671 (1964), cert. denied 379 U.S. 968 (1965), *Walker vs. Courier Journal, etc.*, 246 F.Supp. 231 (W.D. Ky., 1965), reversed on other grounds, No. 16999, 6 cir., Oct. 28, 1966, *Jacobowitz vs. Posener*, N.Y. Law Journal, Nov. 15, 1966, p. 19, Col 7 (Sup. ct. Queens County).

At the hearing on defendant's motion for summary judgment, the ruling of the court was "that there is no genuine issue of fact and the defendant is entitled to summary judgment as a matter of law." This Ruling overlooks the well pleaded allegations of the amended complaint on the issue of malice there embodied. It was held in "*Farrell vs. D.C. Athletic Union, et al.*", 80 U.S. App. D.C. 396, 153 F.2d 647, that the well pleaded allegations of the complaint must be taken to be true and defendant's affidavit may not be construed to decide material factual issues, its use is purely discovery.

In the case "*Barry M. Goldwater vs Ralph Ginzburg, Warren Boroson and Fact Magazine, Inc.*", U.S. District Court for the Southern District of New York, No. 65 civ. 2676, where the facts were similar to the facts in the case at bar District Judge Wyatt, in a decision dated December 27, 1966, held that the question of "actual malice" was one for the jury and could not be determined on a motion for summary judgment. Judge Wyatt's decision denying Ginzburg and Fact Magazine, et al. motion for summary judgment was appealed and the U.S. Court of Appeals, 2nd Circuit, affirmed Judge Wyatt's decision January 12, 1967.

Certainly the plaintiff's affidavit filed herein, has the effect of pinpointing the source and basis of the malice alleged in the amended complaint, and to that extent breathes new life into the allegations of the amended complaint.

In the "Farrell" case, *supra*, the Court of Appeals observed that: "We need not speculate as to what proportion of their averments plaintiffs need to prove in order to support the relief which they claim on the record as it now stands, the only questions are whether the complaint and the affidavit show that there are genuine issues of material facts and whether the complaint, if proved as averred, states a claim for which relief can be granted. In our view, the answers to both questions are affirmative."

It is the position of the plaintiff herein that the allegations of the amended complaint coupled with his affidavit show that there are genuine issues of material facts for trial determination.

II

THE DOCTRINE OF "TIME, INC. V. HILL," 385 U.S. 374 (1967)

The question presented in the above case was whether the publisher of Life Magazine was denied constitutional protections for speech and press by the application of §§ 50-51 of the New York Civil Rights Law, involving the right of privacy.

The jury awarded appellee, Hill, \$50,000.00 compensatory and \$25,000.00 punitive damages. On appeal the appellate division of the Supreme Court ordered a new trial as to damages but sustained the jury verdict of liability. At the new trial on damages, a jury was waived and the court awarded \$30,000.00 compensatory damages without punitive damages. The New York Court of Appeals affirmed the judgment of the appellate division. The Supreme Court noted probable jurisdiction of the appeal to consider the important constitutional questions of freedom of speech and press involved. The case was first argued, and the re-argument was ordered by the court, 384 U.S. 995.

One of the questions to which the court directed argument, upon re-argument is as follows: "Should the per curiam opinion of the New York Court of Appeals be read as adopting the following portion of the concurring in the appellate division: "However, if it can be clearly demonstrated that the newsworthy item is presented, not for the purpose of disseminating news, but rather for the sole purpose of increasing circulation then the rationale for exemption from section 51 no longer exists

and the exemption should not apply. In such circumstances the privilege to use one's name should not be granted even though a true account of the event be given - let alone when the account is sensationalized and fictionalized." 384 U.S. 995. The Supreme Court, in its review of pertinent decisions, commented on the opinion of the New York Court of Appeals in "Spahn vs. Julian Messner, Inc.," 18 N.Y. 2d 324, 221 N.E. 2d 543, as follows:

"the Court of Appeals said: 'But it is erroneous to confuse privacy with personality or to assume that privacy, though lost for a certain time or in a certain context, goes forever unprotected. — thus it may be appropriate to say that the plaintiff here, Warren Spahn, is a public personality and that, insofar as his professional career is involved, he is substantially without a right to privacy. That is not to say, however, that his personality - may be fictionalized and that, as fictionalized, it may be exploited for the defendant's commercial benefit through the medium of an unauthorized biography.'

Here the Supreme Court makes the point that even though section 51 of the New York Civil Rights Statute strips baseball pitcher Warren Spahn of his privacy because he is a noteworthy person, yet, his action survived the statute insofar as his privacy was "fictionalized" and "exploited" for the defendant's commercial benefit.

In the "Time, Inc. vs. Hill" case, supra at page 387, the Supreme Court made the following comment on "New York Times Co. v. Sullivan," 376 U.S. 254: "We held that the Constitution delimits a state's power to award damages for libel actions brought by public officials against critics of their official conduct. Factual error, content defamatory of their official reputation, or both, are insufficient for an award of damages for false statement unless actual malice - knowledge that the statements are false or in reckless disregard of the truth - is alleged and proved." (Emphasis supplied).

In further comment on the decision of the New York Court of Appeals in the Spahn case, *supra*, the Supreme Court observed at page 387 of its opinion in the "Time, Inc. v. Hill" case, *supra*, that: "Spahn opinion reveals that the defendant in that case relied on 'New York Times' as the basis of an argument that application of the statute to the publication of a substantially fictitious biography would run afoul of the constitutional guarantees. The Court of Appeals held that 'New York Times' had no application. The Court, after distinguishing the cases on the ground that 'Spahn' did not deal with public official conduct, then says, 'the free speech which is encouraged and essential to the operation of a healthy government is something quite different from an individual's attempt to enjoin the publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter. We perceive no constitutional infirmities in this respect'.---If this is meant to imply that proof of knowing or reckless falsity is not essential to a constitutional application of the statute in these cases, we disagree with the Court of Appeals. We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." (Emphasis supplied).

Here again the Supreme Court makes it clear that "actual malice", "knowledge of falsity" and "reckless disregard of truth" are actionable in defamation cases, notwithstanding the protection given freedom of speech and press under the first amendment to the Federal Constitution.

The opinion of Mr. Justice Brennan in "Time, Inc. v. Hill," *supra* at page 389, makes the further observation, and holds:

"But the constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function. We held in 'New York Times' that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct. Similarly, calculated falsehood should enjoy no immunity in the situation

here presented us. What we said in *Garrison v. Louisiana*, supra, at page 75, is equally applicable: 'the use of calculated falsehood---would put a different case on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech it does not follow that the lie, knowingly and deliberately published—should enjoy a like immunity—for the use of the known lie, as a tool, is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected. Calculated falsehood falls into that class of utterances which are not essential parts of any exposition of ideas, and are such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.---Hence the knowingly false statements made with reckless disregard of the truth, do not enjoy constitutional protection."

The plaintiff concedes the decisions of the Supreme Court have construed the freedom of speech and press provisions of the first amendment, so as to grant immunity to the press for innocent and negligent misstatement in its publications, but that there is nothing in any of the foregoing decisions that extends the principle to non-public officials or non-public characters.

III

PLAINTIFF WAS NOT A PUBLIC OFFICIAL WITHIN THE MEANING OF THE SUPREME COURT DECISIONS

Plaintiff relies upon the settled law as set forth with ample citation of authority in *State ex Relation Barney v. Hawkins*, 79 Mont. 506, 257 p. 411, 53 A.L.R. 588 (annotated on the point at page 595), that he was not a public official at the time of the defamatory publications. The early federal cases recognizes this doctrine, as settled law. See, *Martin v. United States*, 93 cc A 484, 168 Fed. 198, *United States v. Maurice*, 2 Brock 96, *Adams v. Murphy*, 91 cc A 272, 165 Fed. 304.

"Practically all of the authorities--hold that to an officer are granted some of the sovereign powers of the government, to be exercised for the benefit of the public. They hold, also, quite generally that an officer's duties must be prescribed by law, and that he must be independent in the exercise of them, and not subject to orders from superiors as to the nature or discharge of his duties.---Those two Rules, stated above, delegation of sovereign powers and independent exercise of it, appear to be general," *State ex Relation Barney v. Hawkins*, supra, 53 A.L.R., at 589.

"The duties of an officer are fixed by law, and an employment arising out of a contract, whereby the person employed acts under the direction and control of others, and which employment depends for its duration and extent upon the terms of such contract, is not an office--while an officer may be appointed by constituted authority; yet in the discharge of his duties, he knows no guide but the established law, and cannot be lawfully directed by others in the conduct of his office." *Farley v. Board of Education*, 62 Okla. 181, 162 p. 797. See, *State ex Rel Landis v. Board of Commissioners, etc.*, 95 Ohio State 157, 115 N.E. 919, *Barney v. Glenn County*, 42 Cal. appl 2d. 76, 108 p. 2d. 81, *Graves v. City of Ponder*, 303 S.W. 2d 485 (Tex.) and *State ex Rel Wickens v. Clark*, 208 Ind. 402, 196 N.E. 234.

It is, therefore, manifest from the above decisions that the plaintiff herein was not a public official at the time he was libeled by the defendant. That as a result of this void the order entered herein on May 23, 1967, is challengeable on two grounds, namely: (1) the record shows the existence of "actual malice," and (2) does the innocent and negligent doctrine extend to individual citizens?

CONCLUSION

Where a newsworthy item is presented (as here) not for the purpose of disseminating news, but rather for the sole purpose of increasing circulation, then the rationale for exemption from defamatory publications no longer exists, and a fortiori, this is more so true where the plaintiff is the designed object of the venomous publisher.

For the reasons stated herein plaintiff urges the court to alter or amend its order entered herein on May 23, 1967, by placing the cause herein on the trial calendar for determination on its merits.

/s/ Dolphin G. Thompson
Plaintiff

* * *

AFFIDAVIT OF PLAINTIFF

DISTRICT OF COLUMBIA, ss:

DOLPHIN G. THOMPSON, being first duly sworn under oath, according to law deposes and says that he is the plaintiff in the above cause, and a citizen of the District of Columbia, residing therein at premises 4724 Southern Avenue, SE, and that heretofore, in the year of 1961, he was president of the Capital Press Club, a responsible professional newsmen's and journalists' society in said District, and as the elected leader of this organization of newsmen and journalists dedicated to a program of improvement and the expansion of conditions and opportunities within the group, your affiant thereupon chartered a course of inquiry in the policies of local newspapers in respect to the employment of persons of color in capacities of reporters or other journalistic categories, that the result of said inquiries disclosed that during the year of 1961, the Evening Star Newspaper Company had not hired, or had in its employ any person of color in the capacities described above, that as a result of the said survey together with a careful consideration of the complaints received by the aforesaid organization, your affiant sought to effect a change in the said policy of the Evening Star Newspaper Company, by appealing to other civic organizations and leaders to join in a crusade to urge the Evening Star Newspaper Company to discontinue its current policy against the employment of qualified persons of color, and to inaugurate an employment policy free of racial barrier, that as a result of your affiant's efforts in these respects the Evening Star Newspaper Company reluctantly amended its hiring policy and thereupon included qualified persons of color in its employment program and expanded its coverage of racial events.

Your affiant further states that while the said amended hiring policy has inured to the benefit of the Evening Star Newspaper Company, it also served to incur the wrath of the Evening Star Newspaper Company against your affiant, the said wrath is evidenced by the letter of its editor Newbold Noyes, addressed to your affiant under the date of January 18, 1961, a photo-copy of which is attached hereto and made a part hereof by reference, as affiant's Exhibit "A".

That upon receipt of said letter your affiant responded by suggesting a conference between the said editor and a small committee, including your affiant to resolve any difference that existed, but to the contrary the Star's editor, Newbold Noyes, refused such a proposed conference in a letter addressed to your affiant under the date of January 31, 1961, a photo-copy of which is attached hereto and made a part hereof by reference, as affiant's Exhibit "B". Your affiant further states that the hostility exhibited and directed to your affiant by said editor Newbold Noyes, was so widely expressed and circulated throughout the community that a columnist for the national weekly newspaper, THE PITTSBURGH COURIER, (Robert L-Robinson) wrote in his column, under the date of November 16, 1963, as follows: ". . . The Courier also was informed that Dolphin Thompson, a D. C. Public Relations figure, has very little chance of gaining this post." A member of the D. C. Democratic Assembly said: "Mr. Thompson will not get that group's Negro support for many reasons. Also, a daily newspaper has sworn to tear Mr. Thompson apart if he ever seeks any kind of public office." A photo-copy of the said Robinson's column is attached hereto and made a part hereof by reference, as affiant's Exhibit "C".

The the [sic] foregoing shows beyond question that a basis of malice and animosity is exhibited against your affiant by editor Newbold Noyes of the Evening Star Newspaper Company, and it demonstrates the latter's opposition to social change and the extension of equal opportunities to persons of color in the District of Columbia, that this venom is translated in the defamatory publications of the defendant charged in affiant's amended complaints, that this ill will, and this vengeance were

knowingly and recklessly directed to the affiant in describing him as a black muslim in said defamatory publications, that the application of the phrase "Black Muslim" to a person of color, who is a non-believer in the doctrine of racial hate, is the most opprobrious and abusive appellation existing in America today, that such reference and description subject a non-believer to the advocacy of the doctrine of racism, and as a supporter of the code of civil conduct reflecting an "eye for an eye".

That for your affiant to be characterized a "black muslim" in a front page Sunday edition of the defendant's newspaper, just two days before the 1964 election, knowing that the statement was grossly false, constituted an evil and maliciously designed act, an act which the founding fathers intended not to be protected under the first amendment to the Federal Constitution. That these defamatory publications, not only caused great losses in affiant's business, but they also subjected your affiant and his family to many anonymous abusive calls, the loss of valued friendships and many public embarrassments.

/s/ Dolphin G. Thompson

[JURAT dated June 6, 1967]

THE PITTSBURGH COURIER Nov. 16, 1963

Washington Dateline

By ROBERT L. ROBINSON

wield great political power on the local scene. We also learned from hard-working members of the D. C. Democratic Assembly, that there is a high regard for Kenneth Kennedy, a real estate broker. It is felt that Mr. Kennedy, an Alabama native, who cut his political teeth in Chicago, does not have enough political savvy to give Washington proper representation.

The Courier also was informed that Dolphin Thompson, a D. C. public relations figure, has very little chance of gaining this post. A member of the D. C. Democratic Assembly said, Mr. Thompson will not get that group's Negro support for many reasons. Also, a daily newspaper has sworn to tear Mr. Thompson apart if he ever seeks any kind of public office.

The third member of the trilogy frequently mentioned, is the Rev. E. Franklin Jackson, pastor of the John Wesley AME Zion Church and president of the local NAACP. We understand, he has more of a chance than the other two contenders, but it is very slim.

The city council is expected to start hearings within two or three weeks on the bill. Action is slated sometime after the first of the new year.

Local scuttlebutt has it that a dark horse may emerge if Atty. Frank Reeves is dropped from his post as Democratic National Committeeman for the District of Columbia.

This column was told that a Negro attorney is being discussed by a group of clergymen and civic leaders who

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from the original bound volume

[Filed June 19, 1967]

ORDER

Upon consideration of the motion of Plaintiff to amend or alter judgment and/or Order of May 23, 1967 filed herein June 6, 1967, it is this 19th day of June, 1967,

ORDERED that the said motion be and the same hereby is denied.

ROBERT M. STEARNS, CLERK

By /s/ Amelia G. Shannon
Deputy Clerk

JOSEPH C. McGARRAGHY
PRESIDING JUDGE

[Filed June 19, 1967]

NOTICE OF APPEAL

Notice is hereby given that Dolphin G. Thompson, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final Judgment entered in this action on May 23, 1967, in favor of defendant and against the plaintiff.

/s/ Dolphin G. Thompson, Pro Se
Plaintiff

* * *

* * *

[Filed June 23, 1967]

MOTION TO DISMISS NOTICE OF APPEAL

Comes now the defendant, Evening Star Newspaper Company, and moves the Court for an Order dismissing the Notice of Appeal filed herein by the plaintiff on June 19, 1967.

As grounds for this motion, counsel states that defendant's Motion for Summary Judgment was granted on May 11, 1967 and therefore the

Notice of Appeal filed 39 days later is untimely under the provisions of Rule 73(a), Fed. R. Civ. P.

Respectfully submitted,

HOGAN & HARTSON

By /s/ Francis L. Casey, Jr.

/s/ Robert C. Maynard

* * *

Attorneys for Defendant

[Filed June 30, 1967]

ORDER

Upon consideration of plaintiff's motion to alter or amend the judgment herein, the memoranda of the parties, plaintiff's affidavit in support of the motion, and the record herein, it is by the Court this 30th day of June, 1967

ORDERED that plaintiff's motion be and the same is hereby denied as being without merit and the Court being without jurisdiction to consider the motion because it was served more than 10 days after the entry of judgment and therefore untimely under the provisions of Rule 59(e), Fed. R. Civ. P.

/s/ Joseph C. McGarraghy
Judge

[Filed July 17, 1967]

ORDER

Upon consideration of defendant's Motion to Dismiss Notice of Appeal and the oral arguments of the parties thereon, it is by the Court this 17th day of July, 1967

ORDERED that defendant's Motion be and the same is hereby denied.

/s/ Joseph C. Waddy
Judge

[Certificate of Service]



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APPELLEE'S SUPPLEMENTAL APPENDIX

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,171

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 4 1967

Nathan J. Paulson
CLERK

DOLPHIN G. THOMPSON,

Appellant,

v.

THE EVENING STAR NEWSPAPER CO.,

Appellee.

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

(i)

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S.A.1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOLPHIN G. THOMPSON
Plaintiff

v.

THE EVENING STAR NEWSPAPER
COMPANY
and
THE WASHINGTON DAILY NEWS
CO., INC.

Defendants

Civil Action No.
2011-64

[Filed Nov. 3, 1964]

REQUESTS FOR ADMISSIONS

* * *

The plaintiff is requested to admit for the purpose of the pending action only the following facts:

1. That a slate sometimes called "Crusade for a Better Washington" was organized by him and another or others;
2. That both he and John Thornton are Negroes;
3. That candidates on that slate include Jesse O. Dedmon, a Negro lawyer and Patricia McGerr, a white writer;

* * *

8. That you arranged two press conferences for Malcolm X;

* * *

HOGAN & HARTSON

By David N. Webster
Attorney for Defendant The
Evening Star Newspaper Co.

[Certificate of Service dated November 3rd, 1964]

[Filed Nov. 13, 1964]

ANSWERS TO
REQUEST FOR ADMISSIONS

The plaintiff makes the following statements to defendant, The Evening Star Newspaper Company's request for admissions, under oath:

1. Plaintiff, Dolphin G. Thompson, admits that a slate sometimes called, "Crusade for a Better Washington" was organized by him and another or others.

2. Plaintiff admits that he is a Negro; but cannot admit that John Thornton is a Negro.

3. Plaintiff admits that candidates on that slate include Jesse O. Dedmon, a Negro Lawyer and Patricia McGerr, a white Writer.

* * *

8. Plaintiff denies that he arranged two press conferences for Malcolm X. In a letter which I wrote to the "STAR" on or about May 24, 1964 it was erroneously stated that I had arranged two news conferences for Malcolm X, however upon closer reflection, it is recalled that as a matter of fact that I arranged one news conference for Malcolm X.

* * *

/s/ Dolphin G. Thompson

District of Columbia, ss:

Dolphin G. Thompson being first duly sworn on oath according to law deposes and says that he has read the foregoing Answers to Request for admissions by him subscribed and knows the contents thereof and the statements made of his own knowledge, are

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true and the statements made upon information and belief he varily
[sic] believes to be true.

/s/ Dolphin G. Thompson

[Notary Public, ss, dated November 13, 1964]

/s/ King David

Attorney for Plaintiff

[Certificate of Service]

Filed March 16, 1967]

**STATEMENT OF MATERIAL FACTS AS TO WHICH
DEFENDANT CONTENDS THERE IS NO GENUINE ISSUE**

1. Plaintiff was an organizer of, supporter of, backer of, spokesman for, and public relations counsellor to the so-called "Dedmon slate" of candidates in the Democratic primary election of May, 1964 (Amended Complaint, p. 11). He was the chairman of the Jesse Dedmon-Patricia McGerr Democratic Campaign Committee from the time of its organization in February, 1964 (Pl's Dep. p. 8).

2. Defendant, a corporation doing business in the District of Columbia, publishes a newspaper known as The Evening Star which is distributed in the Washington, D.C., metropolitan area (Amended Complaint, Answer to Amended Complaint).

3. On May 3, 1964, defendant published a newspaper article entitled "Special Report—The War of the D.C. Democrats" (Amended Complaint, Exhibit No. 1, Answer).

4. On May 6, 1964, defendant published an editorial captioned "Old Guard Victory" (Amended Complaint, Exhibit No. 2, Answer).

5. On May 24, 1964, defendant published a letter to the Editor from the plaintiff, which was followed by an "Editor's Note" (Amended Complaint, Exhibit No. 3, Answer, Pl's Dep. 92, 93).

6. In early May, 1963, Malcolm X conducted a news conference at the District of Columbia National Airport, that was arranged for him by the plaintiff, for a fee (Pl's Dep. 39).

Also in May, 1963, Malcolm X had a news conference outside the office of Congresswoman Edith Green of Oregon. The plaintiff met Malcolm X at Congresswoman Green's office, by prearrangement, on that occasion (Pl's Dep. 38, 39). Prior to the conference, plaintiff preceded Malcolm X to the microphone and counseled the assembled reporters to be objective and not debate with Malcolm X (Pl's Dep. 39, 40, 120, 121).

On another date in May 1963—the 12th of that month—the plaintiff was present at a local radio station WUST for a meeting in which Malcolm X made unflattering remarks regarding Dr. Martin Luther King (Pl's Dep. p. 119).

7. The plaintiff was associated with a slate of candidates for the May, 1964, District of Columbia Democratic primary election, which the plaintiff talked of as "Crusade for a Better Washington" and for which he and his associates had printed material which referred to this slate as "Crusade for a Better Washington" (Pl's Dep. 11, Pl's Admission 1).

8. The plaintiff participated in the organization of the slate sometimes known as "Crusade for a Better Washington."

9. The plaintiff is a Negro (Pl's Admission 2).

10. The said slate of candidates included Jesse O. Dedmon, a Negro lawyer and candidate for committeeman, and Patricia McGerr, a white writer and candidate for committeewoman (Pl's Admission 3).

11. There were three or four white candidates for the Party Committee on the said slate (Pl's Dep. 26).

12. Messrs. Joe Rauh, Jr., and John Kenney are Caucasians.

13. Mr. Walter Pincus obtained a copy of a pink Fact Sheet on Rev. Frank Jackson during the campaign and that sheet stated that two white men were backing Rev. Jackson's campaign and Rev. Jackson admitted that "He who pays the fiddler, calls the tune" (Pincus Affidavit and attached exhibit).

14. The plaintiff was ambitious for Negroes to build their strength in the Democratic Party in May of 1964 (Pl's letter to the editor of May 24, 1964, Amended Complaint, Exhibit No. 3, Pl's Dep. 93).

15. The said slate picked Jesse O. Dedmon as one of its leaders.

16. A majority of the said slate were Negroes (Pl's Dep. 25, 26).

17. Twenty or twenty-one of the candidates on the said slate were Negroes.

18. The editorial referred to and from which quotations are made in the last 11 lines on p. 4 of the Court's Pretrial Order and the first line of p. 5 refer to an editorial published in the Washington Daily News and not by the defendant Evening Star Newspaper Co.

19. The plaintiff had tried to have Rev. Frank Jackson removed or impeached as local President of the National Association for the Advancement of Colored People or, in the alternative, had tried to obtain Rev. Jackson's resignation from that position (Pl's Admission 15, Pl's Dep. 44).

HOGAN & HARTSON
By /s/ Francis L. Casey, Jr.
/s/ Robert C. Maynard
Attorneys for Defendant

[Filed March 16, 1967]

AFFIDAVIT OF GRACE BASSETT

NEW YORK COUNTY)
STATE OF NEW YORK) ss:

1. My name is Grace Bassett. I live at 45 East 74th Street, New York, New York.
2. I am employed by The Evening Star Newspaper Company as a staff writer and have been so employed for about ten years. I am presently on leave of absence to the Russell Sage Foundation to research and write at Columbia University in New York City. I have a Master's Degree from Columbia University in Journalism and a Bachelor of Arts in Political Science from Whitman College, Walla Walla, Washington.
3. My usual assignment at The Evening Star is the coverage of the District of Columbia and urban affairs in the United States Congress. I was relieved of that assignment about six months prior to the District of Columbia primary election of May, 1964 in order to devote myself to coverage of the campaign preceding that election. I was assigned by the editors of The Star to write an analysis of the Democratic Party Primary Campaign.
4. I researched the election and wrote an article which was submitted to the editors of The Star. The material was reorganized and published under the headline "Special Report--The War of the D.C. Democrats" in The Sunday Star of May 3rd, 1964.
5. I believe all the facts contained in the above-described article to be true and correct.
6. The facts reported in the "Special Report" were obtained from three sources:

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a. Before I wrote the article I checked the library clips at The Star on the primary candidates and election issues. Among the clips I found a story on Dolphin Thompson by Mary McGrory dated May 17, 1963 identifying Mr. Thompson as a public relations consultant to Malcolm X, a copy of which is attached hereto.

b. The second sources of my information for this article were my own interviews and observation of the candidates and principals in the campaign. In this connection, I saw Dolphin Thompson several times in the course of the campaign.

c. I spoke frequently to Walter Pincus and Clarence Hunter, reporters for the Star who were also assigned to cover the Democratic party campaign. They supplied me with additional facts concerning each of the candidates. In particular, Mr. Pincus had personally spoken to Dolphin Thompson on April 27, 1964 and obtained a pink handout which made reference to the qualifications of opposition candidates. He gave me the pink sheet and I incorporated a direct quotation from it in my article. (A copy of the "pink sheet" is attached hereto).

8. The article I submitted was not written out of malice or hostility toward Dolphin Thompson but merely as a report of what in fact was occurring in the District of Columbia Democratic Primary Campaign. The article was written in good faith and accurately described the campaign as I viewed it.

/s/ Grace Bassett

Subscribed and sworn to before me this 8th day of March, 1967.

/s/ William Eberhart, Jr.
Notary Public

FACT SHEET ON
REV. FRANK JACKSON

Gross Misuse of NAACP Office

(1) Rev. Jackson was forced to resign his position as President of the NAACP. He attempted to use his position as a campaign tool to mislead the voters in the Registration Drive.

(2) While he was President of NAACP he did nothing to improve conditions for education. He was a member of the infamous "McCarthy Committee" who voted for corporal punishment—a law that permits our children to be beaten in schools.

Character Thief

(3) He was not responsible for Negro employment in the District Banks, as he claims. The whole credit belongs to another very fine minister, who is conscientious and respectful enough not to expose the bragging Rev. Jackson.

Race Baiter

(4) He introduced the race issue in this campaign. He said "If other Negroes enter the National Committeeman race, a white man will be elected. Attorney Jesse Dedmon has called for a public apology from Rev. Jackson on behalf of the people of the District of Columbia.

Job and Favor Seeker

(5) Rev. Jackson sought a job, unsuccessfully, on the District of Columbia Whiskey Board. This indicates most strongly that any kind of job on the public payroll will satisfy him.

Front Man

(6) Rev. Jackson admitted that two rich men, Joe Rauh, Jr. and John Kenney, were backing his campaign. Then he said, "he who pays the fiddler calls the tune. We ask, what is your interpre-

tation of this? Don't permit Rev. Jackson to charm and fool anyone!

Public Deceiver

(7) He has sold his people out at the conference table in many cases (1) He attempted to sell Bishop Smallwood Williams out with the Civil War Centennial Committee. (2) He sold out the new union workers who were fired at a local radio station. (3) He has sabotaged other civil rights organizations on employment cases.

Trust Violator

(8) While president of the NAACP, he repeatedly misappropriated organizational funds for his private use. On one occasion Bishop Williams and Joe Beavers signed charges against him for mishandling NAACP funds.

Shoddy Character

(9) It is a fact that Rev. Jackson has so many character limitations that his denomination will not consider him for high office of Bishop. He is morally unfit for the position, therefore, he is morally unfit for the high office of Democratic National Committeeman.

May 17, 1963.

GREGORY PUTS WIT INTO FIGHT

By Mary McGrory Star Staff Writer

Nobody around here has found much to laugh about in the Birmingham crisis. But Dick Gregory, the Negro comedian who just spent four nights in a Birmingham jail, manages to get off a few funnies about his experience.

"I was in a cell with 500 other people," he quips. "We had wall-to-wall us. There was so many of us there wasn't enough brutality to go around."

Mr. Gregory, who got to the top by "saying out loud what the whites and the Negroes have been whispering to each other for 100 years," came here to do a benefit show for the Southeast Neighborhood House.

Still nursing an arm made sore, he says, when four guards beat him, he has enlisted for the duration in the civil rights fight. He went into Greenwood, Miss., and Birmingham, not as a celebrity but "as an individual first, an American second, and a Negro third."

He got arrested a week ago Monday, with 850 others, for parading without a permit. He is out on bond.

"I have three children. The Southern Negroes are fighting for them. It's my problem, too. I'm involved," he said.

He regards Birmingham as a victory for his people.

Whenever a Negro stands up and says this has to stop, not tomorrow, not next year, but today, it's a victory. We've had a sleeping bear under the couch for 100 years, and he's done woke up. Everybody knew he was there, although they pretended they didn't, and now he jumped up, and he's hungry and he's vicious."

He thinks the Kennedy administration made more mistakes in Birmingham than in any other situation.

"They had no more legal right to send troops in Sunday than they did two weeks before. Everyone in America knows now we have found a formula for getting troops in—stab a white man, turn over a white cab and burn some houses, and they'll come."

He thinks it was "great" to send the children into the demonstrations.

"You couldn't keep those kids out of the line. It's the first time in history that police called up people in the middle of the night and told them their kids were in jail, and they were proud."

Mr. Gregory stood up for Malcolm X, the Black Muslim leader, whose extremism the Kennedy administration frankly fears. To their consternation, Malcolm X appeared yesterday and held a Capitol Hill press conference outside the office of Representative Edith Green, Democrat of Oregon.

Mrs. Green, who had invited Malcolm X to testify before her subcommittee on juvenile delinquency, decided instead to hold a conference with him in her office. It went on for almost two hours.

Malcolm X is a tall, solemn young man.

He was preceded to the microphones by his public relations consultant, Dolph Thompson, who counseled the assembled reporters to be "objective" and not to debate with Malcolm X because "it has been our experience that many news people are not equipped to deal with Malcolm X in a debate. . . . They try to defend white folks and such."

Malcolm X then stepped forward and berated President Kennedy for not sending in troops "while dogs were biting black babies" and Martin Luther King "for trying to please the white folks."

The solution, he says, is for the black man to change his image of himself. No good will come of co-operation, he insisted.

Dick Gregory says Malcolm X is "a brilliant young man" and that the religious character of the Black Muslims has been ignored."

"Look at the Black Muslims this way, I have a corn and I go to the doctor and he takes it off, and then I put my foot into the same tight shoe and it comes back. So what are you going to talk about first, the corn or the shoe?"

Mr. Gregory hasn't studied the situation of his people in Washington, D.C., too closely yet, but he thinks maybe the Negro here has job security but no money.

"He's got the name and the prestige and the feeling, but man, he hasn't got the buck to carry through. I talk to a woman in St. Louis, and she tells me her son is in the government, with the Department of Agriculture. It turns out he's a janitor."

He does not take Adam Clayton Powell's leadership seriously because he's a politician, and "when a man becomes a politician, then he's a different animal altogether."

Mr. Gregory is hopeful about the future—"this thing will break overnight." Meanwhile, he takes a dim view of press coverage of the strife. "Man, you read Time magazine about Birmingham and it's like picking up a Ku Klux Klan scratchsheet."

AFFIDAVIT OF CLARENCE H. HUNTER

DISTRICT OF COLUMBIA, ss:

Clarence H. Hunter, being duly sworn, deposes and says:

1. My name is Clarence H. Hunter, my home address is 1731 Upshur Street, N.W., Washington, D.C. 20011.
2. I am presently employed as Information Officer for the United States Commission on Civil Right, 801 19th Street, N.W., Washington, D.C. I received a Bachelor of Science degree from New York University in 1950, having majored in Journalism.
3. I was employed by The Evening Star, a newspaper in the District of Columbia as a staff reporter from January, 1962 to February, 1965.
4. I was assigned by Sidney Epstein, City Editor, as one of the reporters to cover the political campaign in connection with the District of Columbia primary election which was held in May, 1964.
5. On May 24, 1964 The Evening Star published a letter from Dolphin Thompson followed by an Editor's Note. In this connection, I submitted to the editors of the Star any recollection of instances during the campaign when the phrase "Uncle Tom" had been used by various persons, including Dolphin Thompson.
6. I believe that the Editor's Note is true and correct to the best of my knowledge.
7. On Sunday, May 3, 1964 The Star published an article entitled "Special Report—The War of the D.C. Democrats". The content of the "Special Report" is also based in part upon information I gathered during my coverage of campaign meetings and conversations I had with Dolphin Thompson and various other people associated with the various factions within the Democratic organization.
8. I believe the "Special Report" is true and accurate to the best of my knowledge.

9. In all instances, the information I collected about candidates and issues during the campaign was checked with many people in all factions of the Democratic organization in the District of Columbia.

10. I knew Dolphin Thompson prior to the primary campaign of 1964 and I had numerous conversations with him during the campaign. I bear no animosity, hostility, illwill, or malice toward Dolphin Thompson. The information I supplied to other reporters and editors of The Star was true to the best of my knowledge and was not the result of any malice by me toward Dolphin Thompson.

/s/ Clarence H. Hunter

Subscribed and sworn to before me this 11th day of March, 1967.

/s/ Eva M. Migonis

AFFIDAVIT OF GEORGE D. BEVERIDGE, JR.

DISTRICT OF COLUMBIA, ss:

George D. Beveridge, Jr., being duly sworn, deposes and says:

1. My name is George D. Beveridge, Jr. My home address is 9302 Kingsley Avenue, Bethesda, Maryland.
2. I am presently employed as an editorial writer for The Evening Star Newspaper Company, 225 Virginia Avenue, S.E., Washington, D.C.
3. I write editorials for The Evening Star principally in the field of District and metropolitan area affairs. In this connection it is the policy of The Evening Star to present its views and opinions on matters of public controversy, including the qualifications of candidates for office in a public election.

4. I am the author of the editorial published in The Star on May 6, 1964 entitled "Old Guard Victory".

5. At the time I wrote "Old Guard Victory" which was after the May, 1964 primary election had taken place, I had read the article written by Grace Bassett entitled "Special Report--The War of the D.C. Democrats", which was published in The Sunday Star on May 3, 1964. I also had had numerous conversations with staff reporters, including Miss Bassett and Clarence Hunter, who covered the campaign and the primary election of May 5, 1964. I believed that all of the facts reported in the article by Grace Bassett were true and correct.

6. It was my opinion, based on Grace Bassett's article and the conversations I had with staff reporters who covered the campaign that the Dedmon slate had made a racist appeal during the campaign which deserved repudiation by the voters.

7. The editorial entitled "Old Guard Victory" was written by me, after consulting with the editor, Mr. Newbold Noyes, to present The Star's view on the outcome of the election, and to comment thereon by expressing approval with the results, one of which was the rejection of the Dedmon slate by the voters.

8. The editorial was not written with any personal animosity toward any of the individuals identified with the Dedmon slate.

9. Dolphin Thompson is not known to me personally. I have no recollection of ever having seen or talked to him or having had any other form of communication with him. I bear no animus, hostility, illwill or malice toward him and the editorial described above was in no way motivated by any malice on my part toward him.

/s/ George D. Beveridge, Jr.

Subscribed and sworn to before me this 9th day of March, 1967.

/s/ Janet Keeler, Notary Public

AFFIDAVIT OF WALTER PINCUS

1. My name is Walter Pincus. My home address is 3303 Cleveland Avenue, N.W., Washington, D.C.

2. I am presently employed as an Editor at the Washington Post Company, 1515 L Street, N.W., Washington, D.C. I received a Bachelor of Arts degree from Yale University in 1954.

3. I was employed by The Evening Star Newspaper Company as a special writer from December, 1963 to December, 1964 and as a staff reporter from December, 1964 to February, 1966.

4. As a special writer, I worked under the supervision of Charles Sieb, Executive News Editor. I was writing in the area of campaign finance and chose to do an article on the financing of the 1964 Democratic Primary election in the District of Columbia.

5. In the course of gathering materials for this article, I interviewed Dolphin Thompson on April 27, 1964 in the campaign headquarters of the Dedmon slate in the Dunbar Hotel.

6. During the course of that interview, Mr. Thompson and I discussed a wide variety of campaign activities, among which was the written materials that were being put out by the candidates. Mr. Thompson gave me several pieces of campaign literature, one of which was a pink handout with a mimeographed typewritten text. This handout referred to the qualifications of the opposition candidates.

7. I recall giving this pink handout to Grace Bassett because it had nothing to do with my story on campaign financing. As her desk was next to mine, I knew that Grace Bassett was writing about the issues of the campaign itself, and therefore she would be interested in the contents of the handout.

8. I did not know Dolphin Thompson prior to April 27, 1964. I had talked to him once on the telephone to arrange the interview

and I spoke to him about one hour on April 27, 1964. I may have communicated with him subsequent to that date concerning matters discussed in our interview.

9. I have no animus, hostility, illwill or malice toward Dolphin Thompson and the document I supplied to Grace Bassett was to supplement her knowledge of the campaign issues and not the result of any malice by me toward Dolphin Thompson.

/s/ Walter Pincus

Subscribed and sworn to before me, this 10th day of March, 1967.

/s/ Bonita Sue Latham

EXCERPTS FROM PLAINTIFF'S DEPOSITION

[December 18, 1964]

[Tr 8] BY MR. CONNOLLY:

Q. * * * Precisely what relationship did you have to the Dedmon-McGerr slate? A. I was the chairman of the Jesse Dedmon-Patricia McGerr Democratic Campaign [sic] Committee.

* * *

[Tr. 38] Q. Did you accompany Malcolm "X" to a meeting with Representative Green of Oregon? A. I met him at her office.

Q. By prearrangement? [Tr 39] A. Yes.

Q. Do you know Malcolm "X"? A. Yes.

Q. Did Malcolm "X" ever pay you any money? A. Yes.

Q. What for? A. For arranging a news conference.

Q. Did you speak at that news conference? A. No.

Q. Did you give out any printed handouts? A. No.

Q. Did you give any press releases? A. No.

Q. Did you ever prepare a press release for Malcolm "X"?

A. No.

Q. You just arranged for a press conference? A. A news conference.

Q. When and where? A. It was in May of 1963 at the National Airport.

Q. May 9th, 1963? A. Well, I disrecall the date, but it was in May, early May.

* * *

[Tr 40] Q. Were you present in a hall outside of Mrs. Green's office on May 17th, 1963? A. I am not sure about the date, but I was at Mrs. Green's office in early May, and Malcolm "X" was present.

Q. Was there a large number of newsmen around? A. Yes.

Q. And were questions asked of Malcolm "X"? [Tr 41] A. Yes.

Q. Were questions asked of you? A. No.

Q. Did you volunteer any answers? A. No one asked me any questions.

Q. Did you volunteer to answer any questions asked of Malcolm "X"? A. No, I did not answer any questions asked of Malcolm "X".

Q. Were you in the company of Malcolm "X"? A. Yes, I was at the meeting in May at Congresswoman Edith Green's office.

Q. Were you paid for that? A. No.

Q. Were you paid for arranging the news conference at the Washington National Airport? A. Yes.

Q. Have you been paid by Malcolm "X" for any other professional services? A. No.

Q. The only payment you received was for arranging the news conference? A. Yes.

[Tr 42] Q. How much were you paid? A. \$100.

Q. And that is the only payment you have ever received from Malcolm "X"? A. Yes.

* * *

[Tr. 46] Q. I take it that you worked diligently, did you, for the Dedmon-McGerr Slate? A. I did.

Q. And what did your work consist of? A. Presenting our viewpoints and the virtues of our candidates.

Q. How did you do this? A. By speeches and by talks, and this is about the size of it.

* * *

[Tr 119] Q. On May 13th, 1963, Clarence Hunter wrote an article about a speech that Malcolm "X" gave at the WUST Radio Hall at 9th and "D" streets. You say you were not present then: is that right? A. I wasn't present at any meeting, you say, on the 13th?

Q. It was published the 13th; that was the 12th. A. Was I at a meeting on the 12th?

Q. At WUST? A. Yes.

Q. Were all white persons barred from that meeting? A. I don't know.

Q. Did Malcolm "X" at that meeting call Martin Luther King a fool? A. I don't recall; he might have. He characterized Martin Luther King as many things.

Q. And not very flattering? A. No.

Q. What did you go to that meeting for? A. Well, I had never been to a meeting where he had spoken, and it was general public knowledge, and I thought [Tr 120] that I should go to the meeting to hear how it was. I mean I am in this kind of business, of public relations, and it was a public meeting, and I went to it.

Q. The Mary McGrory story was on May the 17th. At that time you already had an agreement though with Malcolm "X" for \$100, hadn't you, to arrange for a news conference? A. That had concluded. I had arranged the news conference, and it was over.

Q. Mary McGrory in her article of May 17th, 1963, says in part:

"Mrs. Green, who had invited Malcolm "X" to testify before her sub-committee on Juvenile Delinquency, decided instead to hold a conference with him in her office. It went on for almost two hours.

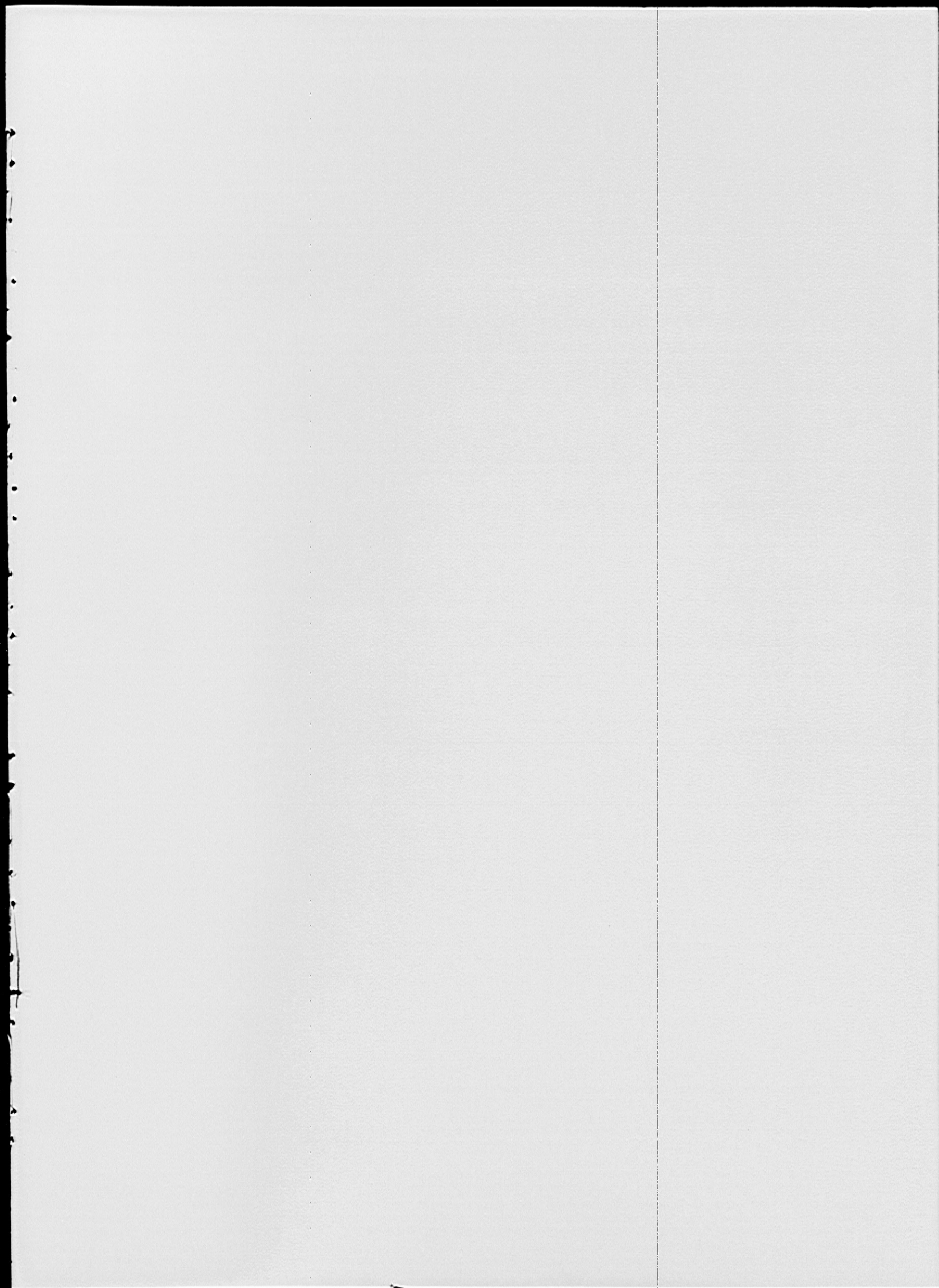
"Malcolm 'X' is a tall, solemn young man. He was preceded to the microphones by his public relations consultant, Dolph Thompson, who counseled the assembled reporters to be 'objective' and not debate with Malcolm 'X', because 'it has been our experience that newspapers are not equipped to deal with Malcolm 'X' in a debate . . . when they try to defend white folks and such.' "

Did you say that? [Tr. 121] A. That last part of it, I didn't say that; the first part of it, I did.

Q. What do you mean, you didn't try, "to defend white folks and so forth"? You didn't say that? A. Yes.

Q. You said the first part? A. Yes, I did.

* * *



BRIEF FOR APPELLEE

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit ^{United States Court of Appeals}
for the District of Columbia Circuit

No. 21,171

FILED DEC 4 1967

Nathan J. Paulson
CLERK

DOLPHIN G. THOMPSON,

Appellant,

v.

THE EVENING STAR NEWSPAPER CO.,

Appellee.

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

FRANCIS L. CASEY, JR.
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(i)

QUESTIONS PRESENTED

1. Whether the trial court, in granting summary judgment to the defendant newspaper publisher in this libel case, properly determined that a public relations counsellor and self-appointed spokesman for a slate of political candidates in a public election was a *public figure* who was not entitled to recover for allegedly defamatory publications in the absence of actual malice.

2. Whether the trial court, in granting summary judgment to the defendant newspaper publisher in this libel case, properly determined that there was no genuine issue of material fact as to the existence of actual malice.

3. Whether the trial court properly granted summary judgment to the defendant newspaper publisher in this libel case upon an uncontradicted showing that the staff reporters responsible for the newspaper articles claimed to be defamatory believed in good faith that the facts therein reported were true.

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*Indicates cases chiefly relied upon.

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,171

DOLPHIN G. THOMPSON,

Appellant,

v.

THE EVENING STAR NEWSPAPER CO.,

Appellee.

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In May, 1964, a Democratic primary election was held in the District of Columbia. This election was a matter of some importance and publicity because, in the general election of November, 1964, the voters of the District of Columbia were to have their first opportunity to vote in a national Presidential election. At stake in the May, 1964 primary elec-

tion were the positions of Democratic National Committeeman and Committeewoman, the offices of delegates and alternate delegates to the Democratic National Convention, and membership in the District of Columbia Central Committee. Three slates of candidates were competing for these various positions, each slate being identified herein by the last name of its candidates for Democratic National Committeeman and Committeewoman — the Jackson-Shackleton ticket, the Reeves-Lanahan ticket, and the Dedmon-McGerr ticket [A 9-10].

Appellant, a Negro, was an organizer, supporter, backer, public relations advisor and principal spokesman for the Dedmon-McGerr slate, and chairman of its campaign committee from the date of its organization in February, 1964 [A6; SA 2, 17, 19].

On Sunday, May 3, 1964, appellee published a composite analysis of the primary election campaign which was about to culminate in the election two days later [A 9-10]. Entitled "Special Report - The War of the D.C. Democrats", this article was researched and drafted by Grace Bassett, then a staff writer for appellee [SA 6]. Miss Bassett relied upon three broadly defined sources of information for this article — her research into past articles on the campaign principals in appellee's library; other appellee reporters who were also covering the campaign; and her own observations of the conduct of the campaign [SA 6, 7].

Specifically, Miss Bassett's article, as redrafted by appellee's editors, asserted that appellant was "no stranger to racial appeals" because he had once been "chief local spokesman for Malcolm X and his Black Muslim Mosque" [A 10]. As her source for that comment, Miss Bassett identified an article in appellee's newspaper of May 17, 1963 characterizing appellant as Malcolm X's "public relations consultant" [SA 7, 11]. In fact, one year prior to the primary election (in early May, 1963), appellant, a public relations counsellor, had accepted a fee of \$100 from Malcolm X and had made the necessary arrangements for Malcolm X to con-

duct a news conference at Washington National Airport [SA 17, 18]. On May 12, 1963, appellant attended a public meeting with Malcolm X at radio station WUST in Washington [SA 19]. And several days later, on May 16, 1963, appellant met Malcolm X by prearrangement outside the office of Congresswoman Edith Green of Oregon, where Malcolm X conducted a press conference. Appellant preceded Malcolm X to the microphone on that occasion and counseled the assembled reporters as to the manner in which their interview should be conducted [SA 17, 18, 19-20].

The day after the election, after the Dedmon-McGerr slate had been soundly defeated, appellee published an editorial commenting upon the results [A 11]. In the editorial entitled "Old Guard Victory", appellee complimented the District voters in rejecting the "blatantly racist appeal" of the Dedmon slate. No reference was made to appellant. "Old Guard Victory" was written by Mr. George D. Beveridge, Jr. who was fully familiar with Grace Bassett's "Special Report" and with the conduct of the campaign as observed by the several staff writers who were covering the campaign for appellee [SA 15]. Mr. Beveridge had no reason to believe that any of the facts reported in the "Special Report" were false [SA 15]. He had read, among other things, that the Dedmon organization characterized another Negro candidate as a "race baiter, favor seeker, front man, public deceiver and shoddy character." Written evidence of this vituperative attack in the form of a printed "pink sheet" [SA 8-9] had come into the possession of one of appellee's reporters, Walter Pincus, directly from the desk and hands of appellant while Mr. Pincus was gathering information on the financial aspects of the campaign [SA 16]. Mr. Pincus gave it to Miss Bassett who incorporated it into the "Special Report" [SA 16, 7]. As a result of what he had read and heard, Mr. Beveridge believed the Dedmon organization had made an appeal to racial prejudice which, in his opinion, deserved rejection by the voters [SA 15].

On May 24, 1964, appellee published a letter to the editor from appellant which criticized appellee for bringing

about the defeat of the Dedmon-McGerr candidates [A 12]. Immediately below appellant's letter, appellee appended an "Editor's Note" indicating its belief that the Dedmon slate had appealed to the "racial prejudice" of the District voters in its efforts to win in the primary election [A 12]. In support of its claim, appellee referred in the Editor's Note to instances when appellant had referred during the campaign to another Negro candidate as an "Uncle Tom" [A 12]. Upon receipt of appellant's letter, Clarence Hunter, a reporter who covered the campaign for appellee, provided information to the editors of appellee concerning his recollection of occasions when appellant and others had used the phrase "Uncle Tom" during the course of the campaign [SA 13]. Based upon his personal observations of the conduct of the campaign, Mr. Hunter believes that the facts set forth in the Editor's Note and in the Special Report are true [SA 13].

Appellant instituted this action in the District Court, claiming that each of the newspaper articles described above constituted a defamation of his character and, in an amended complaint, charged that these articles were published by appellee with malice because of appellee's "prejudice against plaintiff, a colored man" [A 8]. On May 23, 1967, the District Court granted appellee's motion for summary judgment [A 20].

Appellee filed its motion for summary judgment, affidavits in support thereof, and statement of material facts as to which it contended there was no genuine issue on March 16, 1967 [A 1]. Appellant, after obtaining a brief extension of time, filed a memorandum in opposition to appellee's motion on April 4, 1967 [A 1]. No affidavits, depositions, or statement of genuine issues were filed in connection with appellant's opposition.

Appellee contended that the articles alleged by appellant to be defamatory were true; but even if false, there was absolutely no evidence of a knowing publication of a falsehood, or any degree of awareness of falsehood. Appellee's motion was fully argued and a formal order granting summary judgment to appellee was docketed on May 23, 1967 [A 20].

Some fourteen days later, on June 6, 1967, appellant filed a motion to alter or amend the judgment and order of May 23, 1967 [A 20-21]. Accompanying this motion was an affidavit of appellant [A 29-31] with exhibits attached. These exhibits consisted of two letters from appellee's Executive Editor to appellant in January, 1961 [Appellant's Brief 19; 20] and a newspaper clipping from the Pittsburgh Courier dated November 16, 1963 [A 32]. Appellee opposed this motion on the ground that the motion was untimely under Rule 59(e), *Fed. R. Civ. P.*, because not served within ten days after the entry of judgment. Appellant's motion was denied as being untimely and, alternatively, as being without merit [A 34]. This appeal followed [A 33].

RULES INVOLVED

Federal Rules of Civil Procedure, as amended effective July 1, 1966.

Rule 56

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended

Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Rule 59:

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. Added Dec. 27, 1946, eff. March 19, 1948.

Rules of the United States District Court for the District of Columbia.

Rule 9(h):

(h) MOTION FOR SUMMARY JUDGMENT. In addition to the points and authorities required by sub-

paragraph (b) of this Rule there shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure a statement of the material facts as to which the moving party contends there is no genuine issue.

Any party opposing the motion, may, not later than three days prior to the hearing, serve and file a concise "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. (Added February 5, 1960).

In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion. (Added February 5, 1960).

SUMMARY OF ARGUMENT

1. Appellant voluntarily mounted the public rostrum, engaged in public political debate, and identified himself with a slate of candidates seeking office in a public election. He was therefore a "public figure" whose right to recover damages for allegedly defamatory newspaper articles was limited by the First Amendment to a showing of knowing publication of a falsehood, or a high degree of awareness of falsity by the publisher. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

2. The function of summary judgment is to avoid a useless trial in situations where the trial court determines there is no genuine issue of material fact as to the issues involved. Summary judgment is particularly appropriate in First Amendment cases like the instant case wherein the threat of the harassment of a lawsuit "may be as chilling to the exercise of First Amendment freedoms as the fear of the outcome

of the lawsuit itself". *Washington Post Co. v. Keogh*, 125 U.S. App. D.C. 32, 365 F.2d 965 (1966).

3. One against whom summary judgment is sought may not rely on general factual allegations of his pleadings, but has a duty to controvert any material facts advanced by the movant and as to which the movant contends there is no genuine issue. Appellant failed to document his claim that issues of facts existed on the record before the District Court. Having failed to file affidavits or invoke the remedies available to him under Rule 56(f), *Fed. R. Civ. P.*, he should not be heard now to complain that the record contains genuine issues of material fact which he failed to define in the District Court.

4. Actual malice, as that concept is defined in the law of libel by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), requires a showing by a public figure who seeks to recover damages for injury to his reputation that the publisher has made a false statement, either with knowledge of its falsity or with reckless disregard of whether it was false or not. Appellant has made no showing that any of the statements he complains of are false. But, assuming for purposes of argument that some statement contained in the challenged newspaper articles was false, and assuming further that appellant's belatedly filed affidavit is properly before this Court, appellant has failed to show appellee's knowledge of any false statement and the record is devoid of evidence of awareness of falsity or reckless disregard of truth or falsity by any of appellee's personnel. Appellant's reliance upon his personal correspondence with appellee's editor well over three years prior to the newspaper publications complained of is totally misplaced.

5. Appellant's application to the District Court on June 6, 1967 to alter or amend the judgment entered on May 23, 1967 was untimely. The District Court had no jurisdiction under Rule 59(e), *Fed. R. Civ. P.*, to grant relief at that time. Appellant's affidavit and the exhibits cited in his brief therefore are not properly included in the record and should not be considered by this Court in deciding this appeal.

ARGUMENT

I.

**A Public Figure Who Seeks To Recover Damages
for an Allegedly Defamatory Publication
Must Prove Actual Malice.**

In 1964, the Supreme Court placed new limitations on the right of a public official to seek damages against the publisher of allegedly defamatory information. In the now historic case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court recognized:

... a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. 376 U.S. at 270.

The Supreme Court in the *New York Times* case established a rule of Federal constitutional law:

... that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. 376 U.S. at 279-280.

It was in the wake of *New York Times* that appellant filed his amended complaint in the District Court, alleging that appellee published these challenged newspaper articles with knowledge that they were false [A 6]. Appellant obviously recognized at that time that the Courts were unlikely to distinguish a public official on the one hand from the public life of private citizens who voluntarily engaged in public discussion and debate of important public issues on the other.

Two such men were Linus Pauling, a distinguished professor of chemistry whose well-publicized efforts to bring about this country's participation in a nuclear test ban treaty re-

ceived an abundance of editorial comment in the public press, and General Edwin Walker, a vocal critic of the Federal government's intervention into school desegregation in the South.

In *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967), the Eighth Circuit found itself compelled by the force of logic to apply the rule in *New York Times* to Linus Pauling:

Professor Pauling, by his public statements and actions, was projecting himself into the arena of public controversy and into the very "vortex of the discussion of pressing public concern." He was attempting to influence the resolution of an issue which was important, which was of profound effect, which was public and which was internationally controversial. 362 F.2d 195.

. . . a rational distinction cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of national policy will be less important to the public interest than will criticism of government officials. A lobbyist, a person dominant in a political party, the head of any pressure group, or any significant leader may possess a capacity for influencing public policy as great or greater than that of a comparatively minor public official who is clearly subject to *New York Times*. It would seem, therefore, that if such a person seeks to realize upon his capacity to guide public policy and in the process is criticized, he should have no greater remedy than does his counterpart in public office. 362 F.2d at 196. (Emphasis added).

Similarly, General Edwin Walker, who had retired from military service to engage in political activity, initiated an action in the state courts of Texas against the Associated Press seeking damages for a news dispatch which described him as giving encouragement to rioters on the campus of the University of Mississippi at a time when Federal marshals were enforcing a Federal court desegregation decree there in 1962. The Texas trial court refused to apply the *New York*

Times standard and was affirmed by the Texas Court of Civil Appeals, *Associated Press v. Walker*, 393 S.W.2d 671 (Tex. Civ. App. 1966). The Supreme Court granted a petition for certiorari to consider whether in this case and in *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965), the "public official" rule of *New York Times* should be extended to "public figures" such as General Walker. In another landmark decision, the Supreme Court held that the recovery of damages by a "public figure" for the publication of defamatory information is also limited by the First Amendment to cases wherein "actual malice" on the part of the publisher can be demonstrated, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Thus the protection of the First Amendment against the harassment of libel suits was extended to publications concerning persons who voluntarily project themselves into the public discussion of public issues, or who seek to influence public opinion or the resolution of public problems. The Supreme Court held that such "public figures" may recover damages in a libel case only:

. . . for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. 388 U.S. at 155.

Dolphin Thompson is in the business of *public* relations [A 3]; he organized a slate of candidates to run in a *public* election [A 6]; he mounted the *public* rostrum on numerous occasions prior to the May, 1964 Democratic primary election to give speeches and debate election issues as spokesman for the candidate of his choice [SA 19]; he appeared on a *public* platform with Malcolm X, then a controversial advocate of racial strife and member of the black nationalist sect known as the Black Muslims [A 6; SA 18, 20]. Although he contended in the District Court that he was not a "public official" or "public figure" within the meaning of *New York Times Co. v. Sullivan*, *supra*, appellant has apparently abandoned that contention in this Court, or at

least does not assert a contrary position [Appellant's brief, 12]. Appellee submits therefore that appellant, the self-styled organizer, chairman, public relations counselor and principal spokesman of the Dedmon-McGerr Campaign Committee, is a "public figure" who was entitled to recover in the District Court in this case only upon a showing with "convincing clarity" of actual malice. *New York Times Co. v. Sullivan*, *supra* at 285-86.

Despite his failure to distinguish himself from the "public figure" rule described above, appellant seeks to rely on this Court's decision in *Afro-American Publishing Co. v. Jaffe*, 125 U.S. App. D.C. 70, 366 F.2d 649 (1966). The *Afro-American Publishing Co.* case involved a private citizen who sought to register an oral personal complaint with the editor of a newspaper and became the object of an editorial which accused him, in effect, of being a racial bigot. This Court's description of what is *not* involved in that case serves at once to distinguish its applicability to this case:

We need not concern ourselves here with the question whether, and to what extent, permissible latitude is governed by the . . . broader doctrine announced by the Supreme Court as to public officials, who cannot recover even for misstatements of fact in the absence of actual malice. One who enters the public arena must expect latitude in the give-and-take of public debate, extending to sharp and coarse comment, and to excessive and perhaps unwarranted characterization. However the public interest privilege applicable against one who invites public judgment is no defense to the action brought by plaintiff. He made a personal telephone call to the editor. But he in no sense mounted a public rostrum, not even by a letter expressly or implicitly intended for publication. 125 U.S. App. D.C. at 77-78, 366 F.2d at 656-57.

Dolphin Thompson entered the public arena in a way that Jaffe did not. Thompson wrote a letter to appellee's editor which was expressly intended for publication, after first in-

viting the most fundamental kind of "public judgment" known to a democratic society, the judgment of the majority of voters in a public election. *Afro-American Publishing Co. v. Jaffe, supra*, can find no parallel in this case.

II.

Appellant May Not Recover for an Allegedly Defamatory Publication in Which He Is Not Identified.

The editorial entitled "Old Guard Victory" published by appellee on May 6, 1964, the day after the District of Columbia primary election, does not contain the name of this appellant, nor does it in any way identify him as an individual. The text of the editorial merely congratulates the District of Columbia voters on their "rejection of the Dedmon slate, with its blatantly racist appeal" [A 11].

In *New York Times Co. v. Sullivan, supra*, Commissioner Sullivan, who had overall supervision of the Montgomery, Alabama, Police Department, brought an action for damages against the New York Times claiming he was injured as a result of a defamatory reference in a Times advertisement to the conduct of the Montgomery, Alabama, Police Department in dealing with student civil rights demonstrations and in harassing the social protest activities of Dr. Martin Luther King. The advertisement did not name or otherwise refer to Commissioner Sullivan personally. The Supreme Court held that any inference which translated an impersonal criticism of the police department into a personal defamation of Sullivan would do violence to the First Amendment:

We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insuf-

ficient to support a finding that the statements referred to respondent. 376 U.S. at 292.

In this case, there is nothing in the record to connect the impersonal reference to the "Dedmon slate" with appellant. The fact that appellant was chairman and principal spokesman for that particular organization is certainly no more significant than Commissioner Sullivan's relationship to the Montgomery Police Department. Under the circumstances, appellee submits that appellant's complaint with reference to the May 6, 1964 editorial fails to state a claim upon which relief can constitutionally be granted.

III.

Summary Judgment Is an Appropriate Remedy in This Libel Case Where the Record Is Devoid of a Showing of Actual Malice.

The function of summary judgment is to avoid useless trials. Upon application of a defendant for summary judgment under Rule 56(b), *Fed. R. Civ. P.*, the trial court's obligation is to determine from the record whether there are any genuine issues of material fact or inferences of fact which require resolution by the finder of fact, 6 MOORE, *FEDERAL PRACTICE* §§ 56.04, 56.08 (2d ed. 1966).

Appellant contends that summary judgment should not have been entered in this case because malice and motive are issues of fact to be determined by a jury. This Court recently had occasion to dispose of a similar contention in *Washington Post Co. v. Keogh*, 125 U.S. App. D.C. 32, 365 F.2d 965 (1966), a case remarkably similar to the instant case which involves application of the principle of *New York Times Co. v. Sullivan*, *supra* in the context of a motion for summary judgment. In the *Washington Post Co.* case, the plaintiff filed an affidavit in opposition to defendant's motion for summary judgment which purported to raise an issue of fact with respect to the existence of "actual malice." This

Court reversed the trial court's denial of summary judgment, stating:

In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered." *Smith v. People of State of California*, 361 U.S. 147, 154, 90 S. Ct. 215, 219, 4 L. Ed. 2d 205 (1959). 125 U.S. App. D.C. at 35, 365 F.2d at 968.

The instant case is even more appropriate for disposition by summary judgment than was *Washington Post Co. v. Keogh*, *supra*. Appellee demonstrated by means of affidavits of its staff writers, appellant's sworn responses to certain requests for admissions, and significant portions of appellant's deposition that its conduct in publishing the newspaper articles in question was in keeping with the "standards of investigation and reporting ordinarily adhered to by responsible publishers". *Curtis Publishing Co. v. Butts*, *supra* at 155. As required by Rule 9(h) of the District Court rules, appel-

lee prepared a statement of material facts as to which it contended there was no genuine issue [SA 3-5] which set forth the basis for appellee's good faith belief that the facts contained in the articles were true.

Appellant's response did not challenge any of appellee's showing. He did not file a statement of facts as to which there was a genuine issue. Thus, the District Court was permitted to assume that the facts as stated by the appellee were true pursuant to that Court's Rule 9(h). Appellant would have this Court conclude that genuine issues of material fact exist. Yet his presentation in the District Court was without the support of affidavits filed in accordance with the provisions of Rule 56(e), *Fed. R. Civ. P.*¹ Confronted with a sworn foundation for the motion seeking judgment against him, appellant did not invoke the provisions of Rule 56(f), *Fed. R. Civ. P.*, authorizing a continuance for the purpose of securing affidavits, depositions or other means of establishing a genuine issue of fact. Under these circumstances, the record was devoid of any showing that the articles in question were published with actual malice and summary judgment for appellee was in order, *Washington Post Co. v. Keogh, supra*.

¹ Appellant did file an affidavit fourteen days after the order granting summary judgment had been entered in the District Court, some four days after the District Court lost jurisdiction to alter or amend that judgment, Rule 59(e), *Fed. R. Civ. P.* Appellee sought unsuccessfully to compel deletion of appellant's affidavit from the record herein because it was never properly before the District Court. A division of this Court denied appellee's motion to remand the record for that purpose "without prejudice to consideration by the merits division of the propriety of the inclusion in the record on appeal herein of appellant's motion to alter or amend judgment and accompanying affidavits and exhibits". Appellee submits that the orderly administration of justice requires rejection of appellant's affidavit and exhibits. Otherwise, appellant will have successfully *created* a record on appeal which is not the same as that considered by the District Court in reaching its decision in this case.

Appellant suggests that the pleadings and pretrial order of the District Court set forth issues of fact with sufficient particularity to avoid the entry of summary judgment against him. The last two sentences of Rule 56(e), *Fed. R. Civ. P.*, dispose of this argument:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

This language was added to Rule 56(e) in 1963 for the express purpose of rejecting that line of reported cases which supports appellant's argument. See Rule 56, *Fed. R. Civ. P.*, 1963. Notes of Advisory Committee on Rules, 28 U.S.C.A.; see also *Lloyd v. Gerber Products*, 260 F. Supp. 735 (W.D. Ark. 1966).

IV.

The Trial Court Properly Found No Genuine Issue of Material Fact as to the Existence of Actual Malice.

In order to establish actual malice with sufficient "convincing clarity" to meet the constitutional standards of *New York Times v. Sullivan*, *supra* at 285-86, appellant was required to show that appellee *knowingly* published a false statement, or that appellee possessed a high degree of *awareness* of falsity, or that appellee published a falsehood with *reckless* disregard of the truth. Stated another way, his burden was to make "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Curtis Publishing Co. v. Butts*, *supra* at 155. A showing of negligent failure by a publisher to dis-

cover inaccuracies by checking news stories in its own files is insufficient to meet this constitutional requirement of proof. *New York Times v. Sullivan*, *supra* at 287-88. Nor is a publisher required to verify information from sources on both sides of a controversial public issue. *New York Times Co. v. Connor*, 365 F.2d 567, 575-77 (5th Cir. 1966).

What then was appellee's "conduct" as described by documents that the District Court could *assume* to be true?

1. Grace Bassett determined from the library clips in appellee's library that appellant had been a public relations consultant to Malcolm X in 1963 [SA 7, 10-12]. This was a more responsible approach to reporting facts than was undertaken by the New York Times in connection with publication of the advertisement challenged by Commissioner Sullivan.

2. Miss Bassett had in her possession the "pink sheet" issued by the Dedmon organization charging another candidate with being a race baiter for interjecting the race issue into the campaign, and inferring that the same candidate, a Negro, was a "front man" for certain white political leaders [SA 8-9]. This pink sheet had come into her possession from Walter Pincus, another appellee reporter who had received it directly from appellant [SA 7].

3. Miss Bassett swore to her belief that the facts reported by her in the "Special Report" were true. [SA 6]

4. George D. Beveridge, Jr., appellee's editorial writer and author of "Old Guard Victory", read the "Special Report" and conferred frequently with other staff reporters covering the primary election campaign. Mr. Beveridge believed that the Dedmon slate had directed the conduct of its campaign to the racial prejudice of the voters [SA 15]. He was justified in that belief by the contents of the Dedmon "pink sheet" as described in the "Special Report".

5. Clarence Hunter heard the phrase "Uncle Tom" used by various campaign principals, including appellant, at various times throughout the campaign. He reported what he heard and saw to appellee's editors [SA 13]. He always

sought to verify his information with many sources within the local Democratic organization [SA 14]. Mr. Hunter believes that the facts set forth in the Editor's Note and in the "Special Report" are true [SA 13].

Appellant contends that evidence of actual malice is contained in his affidavit which was executed, filed and served some fourteen days after the entry of summary judgment by the District Court. That appellant believed himself obligated to file such a tardy affidavit, at a time when the District Court had no jurisdiction to disturb its judgment under Rule 59(e), *Fed. R. Civ. P.*, would seem to imply a concession on his part that the record, as it existed when summary judgment was entered, was devoid of any showing of actual malice.

Assuming that appellant's affidavit is properly before this Court for review, appellant obviously misconceives the nature of "actual malice" in the constitutional sense. Mutual disapproval and disfavor expressed in correspondence with appellee's Executive Editor some three years prior to the articles in question has no bearing on whether those articles contained false statements or were published with knowledge, awareness, or reckless disregard for such falsity. Thus, if appellant's affidavit had properly been before the District Court, the result would have been the same, and the District Court so indicated in its order denying appellant's motion to alter or amend the judgment [A 34].

Appellee's affidavits, appellant's deposition and his answers to requests for admissions demonstrate that the authors of the three challenged newspaper articles had a good faith basis to believe the facts therein reported to be true. They each identified their source of information concerning the facts claimed by appellant to be defamatory. That source, insofar as it concerned appellant's relationship with Malcolm X, the "racist appeal" of his campaign and his use of the epithet "Uncle Tom" was, in each case, appellant himself. Since appellant's affidavit does not take issue with any of those facts, it must be assumed that they are true. Under these

circumstances, summary judgment for appellee was the only disposition of this case consistent with the safeguards afforded to appellee by the First Amendment. *Washington Post Co. v. Keogh, supra.*

CONCLUSION

For the reasons stated, the trial court properly granted summary judgment for appellee, holding that appellant was a public figure who failed to establish a genuine issue of material fact as to the existence of actual malice in appellee's publication of the challenged newspaper articles.

Respectfully submitted,

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